

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-1133

No. 77-1133

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

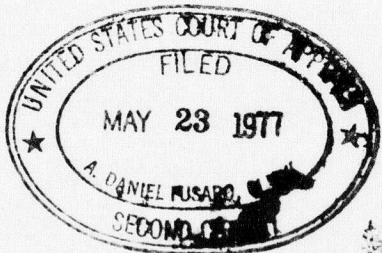
UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

LOUIS DI MAIO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

APPENDIX FOR THE DEFENDANT-APPELLANT



JAMES R. McGOWAN
c/o SALTER, McGOWAN, ARCARO & SWARTZ,
INCORPORATED
300 INDUSTRIAL BANK BUILDING
PROVIDENCE, RI 02903
(401) 274-0300

PAGINATION AS IN ORIGINAL COPY

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OFFENSE NO

OFFENSE MO

MEANOR MIS

FELONY FOR

Case No.

0508

205 03

District Office

DINAILO, LOUIS

(LAST, FIRST, MIDDLE)

Case Filed

Mo 7 Day 14

No of Defs

2

JUVENILE

76 N-76-95 1

Yr Docket No Def

U.S. DISTRICT COURT

OFFENSES CHARGED

ORIGINAL COUNTS

26:7206(2) 18: aided the preparation of a false
2(a) 2(b) U. S. Information return

1

18:371

conspiracy

U.S. MAG.
CASE NO.

TRIAL • RELEASE

☐ AMT ☐ Fugitive
Denied ☐ Set ☐ Pers. Recog.
☐ PSA

\$ 10,000 conditions
Date 7/22/76 ☐ 10% Deposit
☐ Surety Bond
☐ Bail Not Made ☐ Collateral
☐ Status Changed (See Docket) ☐ 3rd ☒ Pry Cust ☐ Other

II. KEY DATES & INTERVALS

SUPERSEDING
COUNTS

ARREST OR	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Begun 7/19/76	High Risk Date 7/14/76	7/20/76	9/27/76
Summons Served	Indict Waived	1st Plea II II	Verdict Date 9/27/76
1st Appearance	Superceding Indictment	Final Plea	Trial Began 1/17/77
	In Other Jurisdiction		Trial Ended 1/19/77

SENTENCE

Disposition of Charges
1/19/77

☐ Convicted ☐ On All Charges
☐ Acquitted ☐ On Lesser Offense(s)
☐ Dismissed ☐ WOP ☐ WP
LI On Government Motion

MAGISTRATE		DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME:
Search Warrant	Issued					☐ DISMISSED
	Return					☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
Summons	Issued					☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW:
	Served					
Arrest Warrant Issued						
COMPLAINT						
OFFENSE (In Complaint)						

U.S. Attorney or Asst.

ATTORNEYS

Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None ☐ Other ☐ PD ☐ CD

Peter C. Dorsey
Michael Hartmere

Amedeo C. Merolla
40 Westminster St. - 20th Floor
Providence, Rhode Island 02903

7:15 401-751-2400

* Show last names and suffix numbers of other defendants on same indictment/information.

(2) DOE a/k/a SMITH

DATE

(DOCUMENT NO.)

PROCEEDINGS

EXCLUDABLE DELAY

(a) (b) (c) (d)

7/14/76 Indictment returned and filed at New Haven.
Indictment ordered sealed on the Motion of the U. S. Atty. Bench warrant to issue. Zampano, J. m-7/15/76

7/15/76 Bench warrant issued and handed to U.S. Marshal for service.

7/20/76 U.S. Magistrate Record of Arraignment, Bail Reform Act Form No. 1, Financial Affidavit, Appearance Bond in the Amount of \$10,000.00 non surety and Warrant of Arrest with Marshal's return thereon, filed.

7/27 Appearance of Amedeo C. Merolla, entered for deft.

7/27 (1) Motion to Dismiss; (2) Motion for Bill of Particulars and (3) Request for Discovery and Inspection, filed by deft.

7/27 Deft. Data Collection Form, filed by Govt.

7/30 Government's Response to Defendant's Motion for a Bill of Particulars, filed.

8/16 Certificate of Compliance Under Local Rule 4 of the Speedy Trial Act, filed by Govt. and defense counsel.

8/18

Name

Final Act.

A-1

A

DATE		IV. PROCEEDINGS (continued)		PAGE TWO		V. EXCLUDABLE DELAY		
1976		(DOCUMENT NO.)				Entered Motion (a)	Start Date End Date (b)	Ex Code (c)
8/18	Memorandum of the Defendant in Support of His Motion to Dismiss, Request for Discovery and Inspection and Motion for Bill of Particulars, filed.	3	8/18/76	E				
8/26	Notice of Readiness, filed by govt.							
8/26	Ruling on Pre Trial Motions, filed and entered. Motion for Discovery and Inspection-granted in part denied in part. Motion for Bill of Particulars Govt's objection are sustained. Compliance by Sept. 13, 1976. Motion to dismiss is denied. Newman, J. m-8/27/76. copies mailed to counsel.	3	8/26/76	E	8			
9/13	Government's Compliance with Deft's Motion for Discovery and Inspection, filed.							
9/23	Marshal's return showing service, filed: Subpoena to Produce (2), Subpoena to Testify (3).							
9/27	Motion to Permit Amedeo C. Merolla as Trial Counsel for the deft. Louis DiMaio in the above entitled three cases and Affidavit of Amedeo C. Merolla, filed. Petition to Appear as Counsel Pro Hac Vice and Notice of Appearance of Ronald S. Guralnick Esq. for the deft. Edward Smith, filed. 2:50 P.M. JURY TRIAL COMMENCES: Court described case to jurors. 43 jurors present. Three jurors excused for cause. Basic panel of 38 names drawn. Govt. allowed 7 challenges and defts. allowed 16 challenges. Twelve jurors and three alternates impanelled. Testimony in this case to begin Oct. 12, 1976. Jurors to be sworn at that time. 3:45 P.M. Jurors excused subject to call. 3:45 P.M. Court adjourned in this matter. Newman, J. m-9/28/76							
9/27	On JON's Jury Assignment List: Motion of Defense counsel to be admitted pro hac vice is granted provided local counsel file an appearance. Ready #4. Newman, J. m-9/28/76.							
9/27	Court Reporter's Notes of Proceedings (JAL) held on 9/27/76, filed. Russell, R.							
10/7	Motion for Continuance by Deft. Louis DiMaio, filed	3	10/7/76	N				
10/7	Jury Trial scheduled for October 12, 1976 over indefinitely. Newman, J. m-10/7/76.							
10/12	Motion for Continuance endorsed: Motion granted. Newman, J. m-10/12/76. copies mailed to counsel	3	10/12/77	N	5+			
11/4	Court reporter's notes of proceedings held before Newman, J. on 11/1/76 filed. Gale, R.							

FINE AND INSTITUTION PAYMENTS		
DATE	RECEIPT NUMBER	C.D. NUMBER
2/22/77	62109	\$5.00 (appeal)
2/24/77	Deposit: GF100869	\$5.00

DATE 1976	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
11/18	Order, filed and entered. It is hereby ordered that the deft. appear personally in this Court at New Haven, Conn., on Nov. 29, 1976 at 10:00 A.M. so that a trial date may be set. Newman, J. m-11/18/76. copies mailed to deft. and counsel of record.				
1977 1/17	JURY TRIAL CONTINUES: Counsel are ready to proceed. Govt's request to charge, filed. Govt. and defense counsel agree to proceed with a jury of eleven. Appearance of James R. McGowan entered for the deft. Counsel agree in writing that the trial in this case may go forward with 11 jurors. Waiver, filed. Court and counsel discuss possible witnesses. 11:15 A.M. 11 jurors present. Five govt. witnesses sworn and testified. Govt. Exs. 1 thru 3 and deft. exs. 501 thru 505, filed. Deft's request to charge, filed. 4:58 P.M. Jury excused until 10:00 A.M. of 1/18/77. Court hears offer of proof as to witness Brochu. 5:20 P.M. Court adjourned until 10:00 A.M. of 1/18/77. Newman, J. m-1/18/77.	3	1/17/77	N	
1/18	JURY TRIAL CONTINUES: 10:10 A.M. 10:17 A.M. 11 jurors present. Three govt. witnesses sworn and testified. One govt. witness previously sworn resumes stand for cont'd testimony. Deft. Exs. 506 thru 510 filed. Govt. Exs. 4 thru 6. Govt. rests 2:43 P.M. Deft. moves for a Judgment of Acquittal denied. Court rules on request to charge. Deft. rests at 3:42 P.M. Govt. opens 3:43 to 3:56 P.M. Deft. closes 3:56 P.M. to 4:25. Govt. closes 4:25 to 4:35 P.M. 4:37 P.M. Jury excused until 10:00 A.M. of 1/19/77. 4:37 P.M. Court adjourned until 10:00 A.M. of January 19, 1977. Newman, J. m-1/19/77.				
1/19	JURY TRIAL CONTINUES: 10:05 A.M. 10:06 A.M. 11 jurors present. 10:06 to 10:45 Court's charge. Counsel for deft. takes exception to the charge. No further charge to be given. 10:50 A.M. By agreement of counsel all full exhibits and Indictment brought to the jury by the Clerk and deliberations begin. 11:52 A.M. Jury returns a verdict of guilty as to Cts. one and two. Jury polled at the request of the deft. and all answer affirmatively. The verdict is verified and ordered recorded. 11:57 A.M. Jury excused until 1/31/77. Case cont'd on same bond for sentencing on 2/22/77. 12:00 P.M. Court adjourned. Newman, J. m-1/19/77				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE 1977	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
1/20	Deft's Supplemental Request to Charge, filed.				
1/24	Court Reporter's Notes of Proceedings (trial) held on Jan 18, 19, & 20, filed. Gale and Russell, R.				
1/24	Marshal's return showing service, filed: Subpoena to Testify.				
2/22	DISPOSITION: Impr. 2 yrs on Cts. one and two, suspended after six mos and the deft. is placed on probation for a period of three years. Deft. is advised of his right to appeal to be filed within 10 days. Deft. moves for a stay of execution motion granted Same bond to continue pending timely filing of a notice of appeal. *Newman, J. m-2/22/77. Court recommends incarceration in Rhode Island and sentence are concurrent. Notice of Appeal, filed by deft.				
2/24	Certified copy of Notice of Appeal and docket entries together with Criminal Information form sent to Clerk U.S.C.A.				
2/25	Judgment and Commitment, filed and entered. Newman, J. Two cert. copies handed to U.S. Marshal. m-2/25/77.				
3/7	Court Reporter's Notes of Disposition held on 2/22/77, filed. Gale, R.				
3/7	Financial Affidavit, filed by deft.				
3/8	JS 3 mailed to A.O.				

FILED

JUL 14 3 06 PM '76

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES OF AMERICA

v.

LOUIS DIMAIO and JOHN DOE, a/k/a
EDWARD S. SMITH

CRIMINAL NO. N-76-95

I N D I C T M E N T

The Grand Jury charges:

COUNT I

That on or about April 5, 1976, at Plainfield, in the District of Connecticut, LOUIS DIMAIO and JOHN DOE, a/k/a EDWARD S. SMITH, hereinafter called the defendants, did wilfully and knowingly aid and assist in, and counsel, procure, and advise the preparation and presentation to the Internal Revenue Service, of a U.S. Information Return (Form 1099) for the calendar year 1976, which was false and fraudulent as to a material fact, in that it represented that on April 5, 1976, the said JOHN DOE, a/k/a EDWARD S. SMITH, was the recipient of compensation in the amount of \$1,261.80 from payment of a winning pari-mutuel trifecta ticket, serial number 1254480, issued by the Connecticut Yankee Greyhound Racing Inc., whereas, as the said defendants then and there well knew and believed, Dennis L. Kubesh was the recipient of said compensation from payment of said pari-mutuel trifecta ticket.

In violation of Section 7206(2), Internal Revenue Code; Title 26, United States Code, Section 7206(2); and Title 18, United States Code, Sections 2(a) and 2(b).

COUNT II

That on or about April 5, 1976, at Plainfield, in the District of Connecticut, LOUIS DIMAIO and JOHN DOE, a/k/a

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DOCUMENT NO 1

EDWARD S. SMITH, the defendants herein, and Dennis L. Kubesh, a co-conspirator but not a co-defendant herein, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to wilfully and knowingly aid and assist in, and counsel, procure, and advise the preparation and presentation to the Internal Revenue Service of a U.S. Information Return (Form 1099) for the calendar year 1976, and to defraud the United States of America by impeding, impairing, obstructing and defeating the lawful Governmental functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment, and collection of the revenue, to wit, income taxes.

In furtherance of the conspiracy and to effect the objects thereof, the defendants did perform the following overt acts:

1. On or about April 5, 1976, at Plainfield, Connecticut, LOUIS DIMAIO approached Dennis L. Kubesh at the Plainfield Dog Track.

2. On or about April 5, 1976, at Plainfield, Connecticut, JOHN DOE, a/k/a EDWARD S. SMITH, signed a U.S. Information Return (Form 1099) as payee of compensation in the amount of \$1,261.80 from payment of a winning pari-mutuel trifecta ticket, serial number 1254480, issued by the Connecticut Yankee Greyhound Racing Inc.

All in violation of Title 18, United States Code, Section 371.

A TRUE BILL

Richard A. Dorsey
FOREMAN

Peter C. Dorsey
PETER C. DORSEY
UNITED STATES ATTORNEY

Michael Hartmere
MICHAEL HARTMERE
ASSISTANT UNITED STATES ATTORNEY

I hereby certify that the foregoing is a true and correct copy of the original document on file. Date: MARCH 14, 1977

By: *Kathleen M. [Signature]*
CLERK

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA)

VS.)

CRIMINAL NO. N-76-95

LOUIS DiMAIO and JOHN DOE, a/k/a)
EDWARD S. SMITH)

REQUEST FOR DISCOVERY AND INSPECTION

Pursuant to Rule 16, Federal Rules of Criminal Procedure and Local Rule 4, the Defendant Louis DiMaio requests the District Attorney permit the attorneys for the Defendant to inspect, or listen to and copy, or photograph, any of the following items within the possession, custody, or control of the Government, the existence of which is known or, by the exercise of due diligence, may become known to the District Attorney:

1. All written or recorded statements or confessions, signed or unsigned, or written summaries of oral statements or confessions, made by the Defendant, or copies thereof;
2. All written or recorded statements or confessions which were made by a co-defendant, and written summaries of oral statements or confessions of such a co-defendant;
3. All books, papers, documents, photographs, sound recordings, or copies thereof, or tangible objects, buildings or places, which are intended for use by the Government as evidence at trial, or were obtained from or belong to the Defendant;

4. All results or reports in writing, or copies thereof, of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, and any tangible objects still in existence that were the subject of such tests or experiments:

5. A written list of names and addresses of all persons whom the District Attorney expects to call as witnesses at the trial in support of the Government's direct case;

6. As to those persons whom the Government expects to call as witnesses at the trial, all recorded testimony before a grand jury of such persons, all written or recorded verbatim statements, signed or unsigned, of such persons and, if no such testimony or statement of a witness is in the possession of the Government, a summary of the testimony such person is expected to give at the trial;

7. All reports or records of prior convictions of the Defendant, or of persons whom the District Attorney expects to call as witnesses at the trial.

8. All warrants which have been executed in connection with the particular case and the papers accompanying them, including affidavits, transcripts of oral testimony, returns and inventories.

9. Any evidence favorable to the Defendant which is material either to guilt or to punishment.

10. All authorizations, applications, orders and returns obtained pursuant to Chapter 119 of Title 18 of the United States Code and all inventories, logs and transcripts and records obtained pursuant to said Chapter 119.

LOUIS DIMAIO

By his Attorney,

Amedeo C. Merolla
Amedeo C. Merolla, Esquire
Temkin, Merolla & Zurier
20th Floor, 40 Westminster Street
Providence, Rhode Island 02903

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FILED

AUG 26 4 32 PM '76

U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :
V. : CRIMINAL NOS. N-76-95,
LOUIS DEMAIO : N-76-98 & N-76-99.

RULING ON PRE-TRIAL MOTIONS

As to motion for discovery and inspection:

From defendant's papers in support of his motion, it appears that the only items in dispute are nos. 5, 6, and 7. No. 5 is granted, see United States v. Cannone, 528 F.2d 296 (2d Cir. 1976). No. 6 is denied, see 18 U.S.C. § 3500. No. 7 is granted as to record of convictions of defendant and denied as to record of convictions of witnesses, subject to government's Brady obligations at trial. Compliance by September 13, 1976.

As to motion for bill of particulars:

Government's objections are sustained. Compliance by September 13, 1976.

As to motion to dismiss:

Defendant attacks the sufficiency of Count 2 of the indictment, alleging a conspiracy in violation of 18 U.S.C. § 371. The overt acts are sufficient to constitute a valid statement of an offense. Whether defendant's knowing participation in the conspiracy is established will depend on the evidence at trial. Nor is there a violation of the so-called

-2-

Wharton's rule by pleading a conspiracy violation in addition to the substantive offense. No agreement is necessary to establish proof of the substantive offense. Cf. 18 U.S.C. § 1955. The motion to dismiss is denied.

Dated at New Haven, Connecticut, this 26th day of August, 1976.

Jon O. Newman
Jon O. Newman
United States District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. N-76-95
	:	
LOUIS DIMAIO and	:	
JOHN DOE, a/k/a	:	
Edward S. Smith	:	

GOVERNMENT'S COMPLIANCE WITH DEFENDANT'S
MOTION FOR DISCOVERY AND INSPECTION

In compliance with this Court's Ruling on Pre-Trial
Motions dated August 26, 1976, the Government hereby provides
the following information:

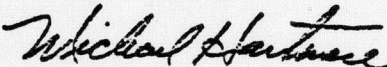
I. List of Witnesses

1. Representative of District Director, Internal Revenue Service, 450 Main Street, Hartford, Connecticut.
2. Special Agent Ted F. Wethje, Internal Revenue Service, Intelligence Division, 450 Main Street, Hartford, Connecticut.
3. Special Agent John J. Dahill, Internal Revenue Service, Intelligence Division, 450 Main Street, Hartford, Connecticut.
4. Allen B. Rapp, Mutuel Manager, Plainfield Greyhound Park, Plainfield, Connecticut.
5. Special Agent Raymond K. Weber, Jr., Internal Revenue Service, Intelligence Division, 450 Main Street, Hartford, Connecticut.
6. Special Agent William A. Smith, Internal Revenue Service, Intelligence Division, 450 Main Street, Hartford, Connecticut.
7. Dennis L. Kubesh, Bull Hill Road, Westchester, Connecticut.

8. James F. Walsh, Jr., Brooklyn Turnpike, Scotland, Connecticut.
9. Sheila Masterson, 851 Wethersfield Avenue, Hartford, Connecticut.
10. Edward J. Smith, 1492 Merle Street, Burton, Michigan.
11. Duncan A. Haley, 4 Butternut Drive, Norwich, Connecticut.
12. Jack R. Calvert Internal Revenue Service, Midwest Region, Chicago, Illinois.

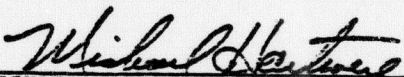
II. Defendants' criminal records as known have been provided to defense counsel. Updated copies of defendants' criminal records will be provided as received.

PETER C. DORSEY
UNITED STATES ATTORNEY


BY: MICHAEL HARTMERE
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

This is to certify that a copy of the within and foregoing Government's Compliance with Defendant's Motion for Discovery and Inspection has been forwarded this 13th day of September, 1976, to: Amedeo C. Merolla, Esquire, Temkin, Merolla & Zurier, 20th Floor, 40 Westminster Street, Providence, Rhode Island, 02903, and Ronald S. Guralnick, Esquire, Guralnick & Gellman, P.A., Suite 1928 Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida, 33131.


MICHAEL HARTMERE
ASSISTANT UNITED STATES ATTORNEY

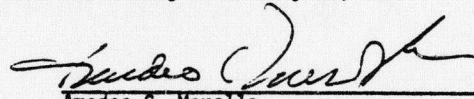
5/6/76

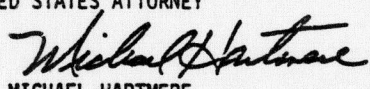
UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :
V. : CRIMINAL NO. N-76-95
LOUIS DIMAIO et al :

CERTIFICATE OF COMPLIANCE UNDER LOCAL
RULE 4 OF THE SPEEDY TRIAL ACT

This is to certify that both the Government and Amedeo C. Merolla,
Esquire, acting on behalf of his client, LOUIS DIMAIO, a defendant in
this case have complied with the discovery requirements as put forth
in the local rules. This defendant was arraigned on July 20, 1976.


Amedeo C. Merolla
Attorney for Louis Dimaio

PETER C. DORSEY
UNITED STATES ATTORNEY

BY: MICHAEL HARTMERE
ASSISTANT UNITED STATES ATTORNEY

1 The executed agreement to proceed with a
2 jury of eleven may be filed.

3 You have one other matter before the jury?

4 MR. HARTMERE: Yes, your Honor. The
5 Government intends to present evidence of prior and subsequent
6 and similar acts. To do this the Government will call Ronald
7 Brochu, who will testify that he filled out ten -- ten forms,
8 1099, between the dates of March 27th of 1976, and April 12th of
9 1976, including two forms for three tickets for the date of the
10 present indictment, April 5, 1976.

11 Brochu would testify that he received all of
12 the winning tickets from the defendant, Lou DiMaio, or co-
13 defendant, Arthur Almeda, who previously pled guilty.

14 He would testify that he was paid a fee for
15 cashing these tickets by either the defendant or Arthur Almeda.
16 Normally, the defendant, I believe.

17 Brochu would further testify that he was
18 warned by the defendant not to talk to anyone from the Internal
19 Revenue Service concerning his, Brochu's, activities, or
20 DiMaio's activities, at the Plainfield Dogtrack.

21 I don't think any of these incidents are
22 any surprise to the defendant. They are all set forth in
23 Criminal No. N-76-99 as overt acts with is a companion indict-
24 ment which names this defendant. The Government submits that
25 the defendant's conduct with Mr. Brochu admits to both prior

1 and similar acts, and clearly admissible under the law of this
2 circuit to prove intent, plan, knowledge, or absence of mistake
3 or accident.

4 I do have some cases, your Honor.

5 THE COURT: Explain again, please, the
6 relationship between his activities on April 5th. What was
7 it that occurred on that date?

8 MR. HARTMERE: On April 5th Mr. Brochu
9 cashed in two forms 1099 for three tickets. That's also the
10 date of this indictment.

11 THE COURT: His testimony is that his action
12 on that date was at the instruction of the defendant?

13 MR. HARTMERE: That's correct, your Honor.
14 And that he was paid by the defendant. But from March 27th
15 to April 12th, he also cashed ten other ones and that they
16 call came from either the defendant or Arthur Almeda.

17 I think the modus operandi is right on it.
18 It's exactly what happened and it's what happened in this
19 present indictment, except in this indictment a man using the
20 name of Edward Smith cashed the tickets.

21 THE COURT: He is not your first witness,
22 is he?

23 MR. HARTMERE: No, he is not, your Honor,
24 but the reason that I bring it up at this time is that my
25 first witness will be the mutual manager at the track, and I

1 wanted to put in all of the 1099s through him. If Mr. Brochu's
2 testimony concerning the twelve 1099s, as he filled them out,
3 is not admissible, there wouldn't be any relevance on the other
4 twelve.

5 MR. MC GOWAN: May I be heard briefly, your
6 Honor?

7 THE COURT: Yes.

8 MR. MC GOWAN: Your Honor, I think Mr.
9 Hartmere has failed to omit one important fact, and that fact
10 is my predecessor counsel in this case, Mr. Merolla, filed a
11 motion, a pretrial motion with this Court, asking that the
12 Government's witnesses be identified and, your Honor, although
13 it's denied -- although your Honor denied most of what Mr.
14 Merolla sought, your Honor specifically granted the request
15 that the Government provide the defendant's counsel with a list
16 of witnesses, which was provided.

17 Mr. Brochu's name is not on that list of
18 witnesses and I submit that at this late state in the game it
19 would be a denial of due process to bring defendant's counsel
20 down here, especially new counsel, and say, "We are going to
21 pull the rug out from under you; we have somebody else. We
22 didn't tell you about him, we didn't comply with the Court's
23 order. We want to change the Court's order unilaterally."

24 That is the important fact I think Mr. Hartmere has
25 not brought to your Honor's attention.

1 MR. HARTMERE: If I may respond briefly.
2 I told Mr. McGowan on Friday when I called him to determine
3 if he was going to be the attorney in this case, I specifically
4 told him Mr. Brochu would be testifying. I told him what my
5 offer would be. I told Mr. Merolla that last Wednesday. That
6 I don't know if I told him specifically Brochu. That was when
7 we were still in the stage of determining who was going to
8 try the case.

9 I told him I would be trying to admit
10 evidence of similar crimes, and from there we went into the
11 legal question of whether I could do it or not.

12 Mr. Brochu's name appears on the witness
13 list for Criminal No. N-76-99, I believe, which is Arthur
14 Almeda, and that was submitted some five months ago, I believe,
15 to the defendant.

16 Mr. Brochu is no surprise to the defendant.
17 They have known about Mr. Brochu from the inception of the
18 case.

19 MR. MC GOWAN: May I respond briefly?

20 We are here to try Case No. 95, not Case 99. I
21 think we should play the ball game one inning at a time. We
22 will get to 99 some other time.

23 With respect to 95, the Government did not
24 tell us that Mr. Brochu was going to be a witness, did not
25 seek to amend at any time its list of witnesses. It is true

1 Mr. Hartmere and I spoke on Friday. At that point I had not
2 even met the defendant. All I knew about the case was sort
3 of second-hand testimony from Mr. Merolla.

4 I was trying to get familiar with the case
5 and when he told me that Mr. Brochu was going to be a witness,
6 I at that time had not studied the list of witnesses that he
7 had supplied Mr. Merolla with some time previously pursuant to
8 your Honor's order.

9 This is months ago. Mr. Hartmere submitted
10 that compliance with that order and if he decided to change
11 or -- to change his list of witnesses, I think he had an
12 obligation to tell Mr. Merolla back at that time and not to
13 say last Friday, "I told the man that had not yet been retained
14 to represent the defendant. "

15 THE COURT: When did you see the list of
16 witnesses?

17 MR. MC GOWAN: I saw it, I think, after I
18 spoke to Mr. Hartmere.

19 THE COURT: For the first time you saw the
20 list you had already heard from Mr. Hartmere that there was
21 an addition?

22 MR. MC GOWAN: No, he didn't say to me that
23 he was changing the list of witnesses. He mentioned the name
24 of Brochu. He said he had a witness by the name of Brochu.
25 The name did not mean a thing to me at the time.

1 THE COURT: Did any name on the list mean
2 a thing to you?

3 MR. MC GOWAN: Other than the name of
4 special agents and one other person, no.

5 THE COURT: I don't quite understand the
6 complaint. If on Friday you had not seen the list of witnesses
7 that --

8 MR. MC GOWAN: Mr. Merolla had, and he was
9 trying to acquaint me with the case, and what his theory was,
10 and what his presentation was.

11 Your Honor, Friday is pretty late in the
12 game, especially at the time of change of counsel, to say,
13 "We are going to add so-and-so's name to the list of witnesses."

14 Mr. Hartmere has been on this case for many
15 months. If he decided he wanted somebody else, why couldn't
16 he have gone through the formal procedure, which is usually
17 followed, and just have amended the list, and give us notice
18 sometime back, and in addition furnish us with anything else
19 that might be helpful.

20 We were told about this for the first time
21 orally on Friday at a time of great confusion in the defendant's
22 camp, when he was trying to still line up an attorney. I
23 wasn't retained in this case actually until I would say some-
24 time Saturday morning.

25 There had been preliminary talk with me, but

1 I was trying to find out what I could on the case, and on
2 very short notice.

3 THE COURT: You didn't know the names of
4 any of the other witnesses on Friday; is that right?

5 MR. MC GOWAN: No. I hadn't studied the
6 list of witnesses. I was not retained in this case until, I
7 would say, until Saturday.

8 Mr. Merolla and I have discussed the case
9 but it was just as people would discuss any case with a legal
10 principle involved, but the people that, the direct principals
11 were not known to me, and I didn't know what they were going
12 to say.

13 THE COURT: How are you in any way disad-
14 vantaged in defending by the addition of a witness on Friday
15 to a list that you didn't even know on Friday?

16 MR. MC GOWAN: I knew there had been a list
17 of witnesses, but this man's name was not on it. Mr. Merolla
18 had told me in a general way how he would have presented the
19 case, and that's what I am going to try to carry out today.
20 But there was no discussion of Brochu because he wasn't aware
21 that Brochu was going to be a witness.

22 I submit to this Court, at this late stage
23 in the game, and in view of the facts in this case it would be
24 denial of due process to say we are going to permit Mr.
25 Hartmere to deviate from the order of this Court, and that's

1 really what he is doing to the injury and prejudice of the
2 defendant.

3 THE COURT: It's that prejudice that I am
4 having trouble getting hold of. That's what I want to know,
5 what prejudice is it to the defendant?

6 MR. MC GOWAN: Presumably, he is going to
7 talk about other incidents, and, incidentally, Mr. Hartmere
8 said he bought the tickets either from Mr. -- he got the
9 tickets either from the defendant or from a Mr. Almeda, and I
10 don't know anything about Mr. Almeda. I am not prepared -- I
11 don't know how to cross-examine this witness with respect to
12 the matters that he is likely to testify about in view of what
13 Mr. Hartmere said.

14 Besides, I think these other acts would
15 probably be highly prejudicial to this man. He is here to
16 defend with respect to the incidents on a particular day
17 with a particular man. The name Kubesh is mentioned in
18 both those counts. The name Brochu was not mentioned.

19 MR. HARTMER: If I may respond briefly.
20 Mr. Merolla was told last Wednesday, I think. He wasn't sure
21 whether he was going to be here, and I told him about the
22 prior subsequent similar acts. Mr. Merolla having been in
23 the case, even at the time that we selected the jury, which
24 was back in September, I believe, September 27th, and at that
25 time we discussed possibly joining all three indictments. We

1 couldn't do it because his co-defendants had not pled guilty
2 at that time, and I felt there would be an argument on severance
3 and we would be back at square one.

4 However, after all the other co-defendants
5 pled guilty, Mr. Merolla and I -- at least it should have been
6 in his mind, that we may try three indictments at once. How-
7 ever, the selection of the jury, I think, interfered with that
8 project, but Mr. Merolla knew last Wednesday.

9 I called Friday to tell
10 him, and the man is named on another witness list. It was
11 not a surprise at all to Mr. Merolla, I am sure.

12 MR. MC GOWAN: That's not what Mr. Merolla
13 told me. In fact, he told me he thought Mr. Hartmere was
14 playing games with him by entering -- by mentioning Mr.
15 Brochu as a possible witness at this stage.

16 MR. HARTMERE: That was because he didn't
17 think legally any evidence of prior subsequent similar acts
18 is admissible.

19 MR. MC GOWAN: No, because you told him
20 Mr. Brochu would, in effect, not be a witness by not including
21 him on the list of witnesses.

22 MR. HARTMERE: That's your interpretation.
23 It was filed September 13th.

24 THE COURT: Did you file a list of
25 witnesses?

1 MR. HARTMERE: Yes, your Honor. I have a
2 copy here.

3 THE COURT: Let me see that. I 't see
4 it in the file. Who is the witness?

5 MR. HARTMERE: The witness is Ronald
6 Brochu, your Honor, whose name is not on that witness list,
7 but whose name was on another witness list in a companion
8 indictment returned at the same time as Criminal Number --

9 THE COURT: Are any of the witnesses
10 individuals who had the same type of transaction with the
11 defendant?

12 MR. HARTMERE: Yes, your Honor. Dennis
13 Kubesh, whose name appears on the list. I believe it is
14 Number 7.

15 THE COURT: Then, for the time being, at
16 least, I will, frankly with some reluctance, sustain the
17 defendant's objection. I say "reluctance," because I have
18 some doubts whether the named decision is really the law of
19 the circuit.

20 I realize it's been said in a panel decision
21 of the Court, and I followed it in this case, and I under-
22 stand that it's not being uniformly followed in the circuit.

23 And perhaps the circuit will one day tell
24 us whether it is teh law of the circuit, but at least as far
25 as the Government's additional presentation, I will sustain

1 the objection.

2 Depending on the nature of the defendant's
3 attack, it may be that the Government's entitlement to other
4 similar acts be derived from those who are not on the list of
5 witnesses, is some substantiation that that matter should be
6 further considered.

7 If it is and the defendant can justify some
8 time for a continuance to meet the evidence, then that can
9 be done. But initially I will limit the Government to the
10 witnesses they have listed.

11 Are the listed witnesses -- are you offer-
12 ing them for any acts other than April 5th transactions?

13 MR. HARTMERE: No, I am not, your Honor.
14 Well, the mutual manager of the Plainfield Dogtrack will
15 testify to procedures at the track, et cetera, but not as to
16 this defendant.

17 I am not offering any --

18 THE COURT: That's offered to prove what
19 happened on April 5th?

20 MR. HARTMERE: Yes.

21 THE COURT: We will proceed initially that
22 way and I will reconsider it either on the basis of defense
23 evidence or on the basis of defense cross-examination. If
24 it presents the type of attack that makes the Government's
25 evidence more -- that makes the need for more substantiation

1
2 J A M E S W A L S H , called as a witness, having
3 been first duly sworn by the Clerk, testified as
4 follows:

5 THE CLERK: Please state your full name and
6 address.

7 THE WITNESS: James Walsh, Box 28, Scotland,
8 Connecticut.

9 DIRECT EXAMINATION BY MR. HARTMERE:

10 Q How are you employed?

11 A I work as a cashier, at the racetrack.

12 Q Which racetrack?

13 A Plainfield Greyhound.

14 Q How long have you worked there?

15 A Since January 2, 1966.

16 Q Since it opened?

17 A The second day -- the third day, something like
18 that.

19 Q Mr. Walsh, I am placing before you Government's
20 Exhibit 1. I would ask you if you have seen that before.

21 A It's got my signature, so I must have.

22 Q What is it, first of all?

23 A It's a 1099 form for trifecta, \$126 keywheel in
24 the third race, 4/5/76.

25 Q Do you fill these out as part of your duties as a

cashier at the Plainfield Dogtrack?

A Yes.

Q Mr. Walsh, can you tell me what writing on Government's Exhibit 1 is done by you?

A The part that says everything but the signature, actually.

Q Everything but the signature?

A Edward Smith -- but Edward Smith's signature.

Q Would you read where it says to whom paid?

A Edward Smith, Cutler Street, Flint, Michigan.

Q It says Ed Smith.

A Ed Smith, not Edward. I'm sorry.

Q What is the address?

A Cutler Street, Flint, Michigan.

Q That is C-u-t-l-e-r; is that correct?

A Yes.

Q Flint, Michigan?

A Yes.

Q And the Social Security number?

A 365-48-6006.

Q And the date?

A 4/5/76.

Q And the ticket number?

A 1254480.

1
2 Q Would you tell me the procedure when a ticket,
3 a winning ticket, on a trifecta race like that is presented to
4 you, what is your procedure as a cashier?

5 A I ask for the person's identification. I copy the
6 identification onto the form and look at the ticket to make
7 sure it's all right, and have him sign it, and pay him the
8 money. That's pretty much it.

9 Q Mr. Walsh, when identification is presented to you,
10 you do the copying down onto that particular form?

11 A At this time we did not.

12 THE COURT: We want to know what you did
13 then.

14 BY MR. HARTMERE:

15 Q On April 5th.

16 A Yes.

17 Q You looked at the identification yourself; then
18 you copied it down onto the form?

19 A Yes.

20 Q I am placing before you Government Exhibit 2 for
21 Identification. I ask if you can tell me what that is.

22 A It's a trifecta ticket, keywheel, \$126 keywheel,
23 four in the first place. It's the same ticket that I cashed.
24 It's a photostat.

25 Q It's a photostat of the ticket you cashed for that

1099?

A Apparently, yeah.

MR. HARTMERE: I offer it as a full exhibit,
your Honor.

THE COURT: Is there objection?

MR. MC GOWAN: No objection.

THE COURT: Government's Exhibit 2 in
evidence.)

(Government's Exhibit 2 in Evidence.)

BY MR. HARTMERE:

Q Again, Mr. Walsh, upon presentation of a winning
ticket such as this, you then fill out that form; is that
correct?

A Right. If it's over \$900.

MR. HARTMERE: I have nothing further, your
Honor.

CROSS-EXAMINATION BY MR. MC GOWAN:

Q In other words, Mr. Walsh, you take down whatever
is handed you by the person who appears at the window?

A Right.

Q With the ticket?

A Exactly.

Q Isn't that right? So if there were three or four

1
2 people who had, let's say, bought \$126 key tickets, you would
3 just take down the name of the man who showed up with the
4 ticket?

5 A Exactly, only one.

6 Q Now, do you have before you Government Exhibit 2?

7 A Yes.

8 Q You also have before you Government Exhibit 1?

9 A Yes.

10 Q Is there any doubt in your mind that the man who
11 showed up and presented you that key ticket was not Louis
12 DiMaio? Do you know if that man was Louis DiMaio or not, the
13 man who presented that ticket to you?

14 A It definitely was not.

15 MR. MC GOWAN: May I have this marked
16 Defendant's Exhibit for Identification 504?

17 (Defendant's Exhibit 504 for Identification.)

18 BY MR. MC GOWAN:

19 Q Mr. Walsh, I show you what has been marked for
20 identification as Defendant's Exhibit for Identification 504.
21 I ask you to look at it for a moment. Is that your signature
22 on that form?

23 A Yes. This is a carbon of it, yeah.

24 Q That shows that the man who got the proceeds of
25 that particular ticket was who?

1
2 A Louis DiMaio.

3 Q Do you see Louis DiMaio in the courtroom here
4 today?

5 A Yes, I do.

6 Q Sitting at the counsel table with me?

7 A Yes, sir.

8 Q And that particular ticket, or that particular Form
9 1099 was filled out in your presence by Mr. DiMaio?

10 A I filled it out and he signed it, yes.

11 Q He stood before you at the window at that particular
12 time?

13 A Yes.

14 Q I see. What was the date on that one?

15 A 3/7/76.

16 MR. MC GOWAN: I would like to offer that
17 as a full exhibit at this time, your Honor.

18 MR. HARTMERE: No objection.

19 THE COURT: Full exhibit.

20 (Defendant's Exhibit 504 in Evidence.)

21 BY MR. MC GOWAN:

22 Q Have you been there at the track since it opened
23 early in January of 1976; isn't that right?

24 A Yes, sir.

25 Q Now, at any time during the time you served there as

1
2 cashier, did the track ever furnish you with the document
3 which has been marked in evidence here as Defendant's
4 Exhibit 502, and is called Instructions for Form 1096?

5 A No, sir, not to me.

6 Q Have you ever read that form?

7 A No, sir.

8 Q Did anybody ever bring it to your attention from
9 the track management?

10 A No, sir.

11 Q Anybody from the Internal Revenue Service ever
12 bring it to your attention?

13 A No, sir.

14 Q Did you ever see any other cashiers at the track
15 with these instructions?

16 A No, sir.

17 Q Now, let's go back to this -- I assume you would
18 fill out quite a few of these 1099s in the course of an evening?

19 A Yes.

20 Q You might do it rather hurriedly?

21 A Yes.

22 Q Sort of a fast operation?

23 A Pret: h as fast as you can go.

24 Q Now, Mr. Walsh, I want to direct your attention
25 to Government Exhibit 1, which I believe the Government

1
2 Q Is there anything on that ticket which would
3 indicate that it cannot be sold to somebody else?

4 A What do you mean? What do you mean --

5 Q For example -- I will withdraw my question.

6 Is there anything that prevents two, three, or four
7 people from purchasing one ticket?

8 A No. It happens all the time.

9 Q Very common?

10 A Yes.

11 Q Then whoever would come up to the window with you,
12 you would just take down his identification; is that right?

13 A Yes. Sometimes you get three, four people come
14 to the window, and they all want to split it. I'd say, "No,
15 you can take one."

16 Q You can only take one name down; that's all you
17 will take?

18 A That's all I will take.

19 MR. MC GOWAN: Thank you.

20
21 REDIRECT EXAMINATION BY MR. HARTMERE:

22 Q When you say it's common for two, three, or four
23 people to buy a ticket, you mean to go in on a ticket and buy
24 it at the window?

25 A Yes.

1
2 Q Two, three, or four people go up, perhaps they are
3 together in the grands ands, one of them goes up and buys a
4 ticket?

5 A Yes. A lot of people pool their money. Like a
6 lot of people, if they are friends, they come and everybody
7 kicks in \$100 and they split it for the day, or something like
8 that.

9 Three old ladies will buy the same number every
10 race, a dollar each. It goes anyway.

11 Q Then someone, or you testified that sometimes two
12 or four people come up and want to fill out the form?

13 A Yes.

14 Q And you fill out one form?

15 A That's all.

16 Q Then you give it to those people that bought the
17 tickets?

18 A I only pay the person who --

19 Q Who presents himself?

20 A Presents himself.

21 MR. HARTMERE: I have nothing further.

22 MR. MC GOWAN: Nothing else.

23 THE COURT: The witness is excused.

24 (Witness excused.)
25

1 D E N N I S K U B E S H, called as a witness,
2 having first been duly sworn by the Clerk of the Court,
3 was examined and testified as follows:

4 THE CLERK: Give us your full name, please.

5 THE WITNESS: Dennis Kubesh. Bull Hill Road,
6 Westchester.

7 THE CLERK: Connecticut.

8 THE WITNESS: Yes.

9 DIRECT EXAMINATION

10 BY MR. HARTMERE:

11 Q How are you employed, Mr. Kubesh?

12 A I work for Electric Boat in the contract department.

13 Q And where is that?

14 A Groton, Connecticut.

15 Q Mr. Kubesh, have you ever been to the Plainfield
16 Dog Track in Plainfield, Connecticut?

17 A Yes, sir.

18 Q And were you there on April 5th of 1976?

19 A Yes, sir.

20 Q Now, on that evening, did you purchase a trifecta
21 ticket for the third race?

22 A Yes, sir.

23 Q And what type of a ticket was it, do you remember?

24 A Combination box. Wheel.

25 Q I'm showing you Government Exhibit 2 --

Kubesh - direct

THE COURT: What did you call it? What type?

THE WITNESS: A wheel.

Q Is that the type of ticket --

A Yeah.

Q -- Government's 2?

And did you purchase that ticket yourself?

A Yes, sir.

Q Okay. Were there any other individuals -- did any other individuals give you any money for the purchase of that ticket?

A The three fellows that were with me.

Q Okay. So the four of you together purchased that ticket?

A Yes, sir.

Q And the price of that ticket was how much?

A \$126.

Q Okay. And did you -- did that ticket that you purchased in the third race win?

A Yes, sir.

Q And how much did it pay, if you remember?

A \$1262.80.

Q Mr. Kubesh, I'm placing before you Government Exhibit 1, which is a Form 1099, up in the corner are the figures 1261.80 --

Kubesh - direct

A Yes, sir.

Q -- is that correct?

A Yeah. That's correct.

Q That's what the ticket which you purchased paid?

A Yes, sir.

Q After finding out that you had won that race with that ticket, what did you do?

A I went up to the window to cash it, and I am not sure if the -- if the teller at the window said I needed identification if I asked him if I needed identification, or just what that small conversation was, and then a gentleman asked me if I wanted to sell it.

Q Someone else --

A Yes, sir.

Q -- asked you if you wanted to sell it?

Okay. And what did you say?

A I said yes. And walked a few feet away from the window and another gentleman paid me for it.

Q This was a second gentleman?

A Yes, sir.

Q How much were you paid for the ticket?

A I think it was about a hundred dollars less than its face value.

Q Okay. So that would have been eleven hundred

Kubesh - direct

something dollars?

A Yes, something like that. I didn't keep it in mind. I didn't pay particular attention to the change factor. I know there was some odd change, but I didn't --

Q Did you have any discussions with this individual as to how much?

A I said nothing.

THE COURT: Well, who are we talking about? The person who first talked to you, or the person who paid you? These are two different people?

THE WITNESS: Yes, sir.

THE COURT: And which one are you asking about?

MR. HARTMERE: The one that he, in fact, paid for the ticket.

THE WITNESS: I don't --

THE COURT: The one who he paid?

MR. HARTMERE: No, the person who paid him.

THE COURT: Who paid him.

MR. HARTMERE: For the ticket.

THE COURT: The second person?

MR. HARTMERE: Yes.

THE COURT: All right.

A To the best of my knowledge, I don't think he said one word, period.

Kubesh - direct

Q Okay. You just walked up to him with this other individual?

A Uh-huh.

Q Had the other individual approached you?

A He asked me if I wanted to sell it.

Q Okay. Did he state any reason?

A No, sir.

Q What did you say?

A I said yes.

Q And did you give that individual, either individual, your name?

A No, sir.

Q Did you give him your Social Security number?

A No, sir.

Q Did you give him any information at all about yourself?

A No, sir.

Q Have you been contacted since April 5th by any person at the track?

A At the track?

MR. MCGOWAN: Objection. Just a moment, please. I think that's improper -- improper or irrelevant, that has no bearing on the question of what took place on April 5th, which is all we're interested in.

Kubesh - direct/cross

MR. HARTMERE: I'll rephrase it, your Honor.

Q Have you been contacted since April 5th by the individual to whom you sold the ticket?

A No, sir. I wouldn't know if -- I wouldn't know him if he did contact me.

Q You wouldn't know who the individual was?

A No, sir.

Q Okay. What about the individual who first approached you?

A No, sir.

Q Haven't been contacted by him?

A No, sir.

MR. HARTMERE: I have nothing further, your Honor.

CROSS-EXAMINATION

BY MR. MCGOWAN:

Q Mr. Kubesh, when you got up to the window, did you have any identification with you at the time?

A I had a Social Security card, and I believe -- again, now, like I told this gentleman over here, I don't know if I asked the question or if the cashier asked me. I think somebody said there was a driver's license needed. I didn't have one.

Q You are pretty unsure about what happened at that occasion, didn't you? I mean those -- as far as what was said

Kubesh - cross

and who said it?

A At the window?

Q Yes.

A At the window, yes.

Q Now, you were there with some friend that day?

A Yes, three other gentlemen.

Q They had all contributed to the ticket?

A We all threw in.

Q Who are "they". What are their names?

A One fellow's name is Chet, who is a dear friend of mine, and the other fellow's a friend of his, whose name was Macky, and the third fellow I don't know, I don't remember his name.

Q Now, this didn't take more than a couple of seconds, did it, up there at the window, this whole operation by which you sold this ticket?

A If I had to estimate a time how long it took?

Q Yes, yes.

A Less than a minute.

Q Didn't you at one time tell the government that it took no more than about 15 seconds?

A I probably did, because I don't think it took much longer than that.

Q I see. And the man who paid you the money didn't

Kubesh - cross

say a word to you?

A Best of my knowledge, he never said one word, not even hello or good-by.

Q Now, did the government show you a series of photographs of people in an attempt to have you identify the people that you dealt with on that evening?

A Yes, sir.

Q They did?

A Uh-huh.

Q And did this happen on more than one occasion?

A Nope. Just once.

Q When was the one occasion?

A When?

Q Yes.

A I don't have my --

Q Just approximate, Mr. Kubesh?

A I would guess August or September.

Q You mean this event took place in April, April 5th, '76?

A I beg your pardon. You see. We talked to these gentlemen several times.

Q Which gentlemen?

A The government representatives.

Q I see.

Kubesh - cross

A And one time they showed me some photographs, and rather than make a bad statement, I'll have to say I don't know which month it was. It was a long time ago.

Q I see.

A I say August or September, but then it -- maybe it was a month before that.

Q I see. But it was several months after this date?

A Yeah, and I didn't bring my notes.

Q Yes.

A So --

Q And how many pictures did they show you altogether, approximately?

A Fifteen, twenty.

Q Fifteen to twenty. And you weren't able to identify the people you spoke to?

A No, sir.

Q And they mentioned to you on this occasion the name of Louie DiMaio, didn't they?

A I'm not sure.

Q You are not sure. You don't recall if they showed you a picture of Louie DiMaio?

A No. As a matter of fact, I don't believe they did mention anybody's name.

Q They just showed you pictures?

Kubesh - cross/redirect

A Just pictures.

Q I see. Thank you.

Now, as I understand the picture, you just stepped a few feet away from the window and this transaction occurred?

A Oh, probably from here to the door.

Q All right. Had you been drinking that night beforehand?

A Yes. I was. We were having a good time, laughing and joking.

Q Right.

MR. MCGOWAN: Thank you, Mr. Kubesh.

REDIRECT EXAMINATION

BY MR. HARTMERE:

Q How much did you have to drink, Mr. Kubesh, approximately?

A Well, we stopped at a restaurant before we went to the track and had a few drinks, and then went to the track and, you know, was drinking while we was watching the races.

Q Were you in possession of your faculties?

A Oh, I think so, yes.

Q You knew what was going on?

A Oh, yes.

Q There's no -- is there any question in your mind as to selling that winning ticket in the third race?

Kubesh - redirect

A. No, I sold it. Yes.

MR. HARTMERE: I have nothing further, your Honor.

MR. MCGOWAN: No further questions, your Honor.

THE COURT: All right. You are excused, Mr. Kubesh.

(Witness excused.)

MR. HARTMERE: Government would call Raymond Weber, your Honor.

1
2 THE COURT: All right. Now, about how many
3 witnesses do you have left?

4 MR. HARTMEKE: I have Special Agent Dahill, and
5 then I'd renew my request to -- on the prior similar acts
6 based on the cross-examination, There may be one other
7 witness, basically, two witnesses, probably.

8 THE COURT: I see. And then do you have any
9 estimate, Mr. McGowan?

10 MR. MCGOWAN: It all depends. I may have one
11 witness, depending on what comes out tomorrow, whom we can
12 reach this evening, but he'll probably be quite short.

13 THE COURT: Well, I think we ought to, since
14 it may bear on scheduling, explore this matter of other similar
15 acts, because there now has been cross-examination which seems
16 to me to be designed to persuade the jury that they ought not
17 to draw the inference that the defendant was involved in the
18 purchase of anybody else's trifecta ticket, and if you are
19 disputing that that's the inference the jury ought to draw,
20 it would seem the government is then entitled to evidence of
21 other similar transactions that would tend to prove that in
22 fact this was that very type of transaction.

23 I had thought initially there was the possibility
24 that the defense's contention centered primarily on whether
25 the form was the right form or some other form.

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3 MR. MCGOWAN: That's a very important part of
4 my case.

5 THE COURT: Well, that may be, but -- and I am
6 not suggesting you need to limit yourself to any one defense --
7 but since you have by your cross-examination challenged other
8 aspects of the case, I don't quite see how I can limit the
9 government to meeting the challenge that you present them
10 with. In other words, if the case was simply yes, Mr. DiMaio
11 engaged in certain transactions, and somebody went up there
12 and they filled out the form, but it was the wrong form, in
13 your view, and that was the issue, then there's no need for
14 cumulative evidence. But the case, apparently, is not that
15 limited. Apparently, from your cross, you're disputing whether
16 on that evening Mr. DiMaio is the person who was engaged in
17 a transaction to buy a trifecta ticket.

18 MR. MCGOWAN: I'm sorry, I didn't hear the last
19 part of what your Honor said.

20 THE COURT: I said, apparently you are disputing
21 whether Mr. DiMaio is the person who on April 5th was engaged
22 in a transaction to buy someone else's trifecta ticket so that
23 it could be presented by -- specifically, by this fellow Collins.

24 MR. MCGOWAN: Your Honor, I certainly do not,
25 and I'm not required to, nor is any defendant required to take
any position other than the government must prove its case.

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2 All the elements of the case. My -- our position is basically
3 that the defendant did not know and could not have known what
4 this man was telling the cashier Walsh 50 feet away on that
5 evening, and, therefore, whatever misrepresentation, if it
6 were a misrepresentation -- it may very well have been -- that
7 was given to Walsh on that evening is not something that is
8 to be associated with the defendant 50 feet away. That is
9 the thrust -- that is the main factual thrust of my case,
10 and which I intend to argue to the jury.

11 THE COURT: That's another proposition altogether,
12 isn't it? At the moment I am focusing on your challenge to
13 whether Mr. DiMaio purchased anyone's trifecta ticket.

14 MR. McCOWAN: Your Honor, I just want to say
15 one thing. It may be relevant to what Mr. -- what Mr. Hartman
16 is trying to do, but since your Honor pointed out earlier in
17 comment on the Second Circuit opinion, it is also extremely
18 prejudicial because the jury is likely to draw the inference
19 if he did anything wrong on some other occasion, then he
20 probably did wrong on this particular occasion.

21 I realize that is all -- on the issue of rele-
22 vance the Court has vast discretion, but I also emphasize
23 to the Court that if you convey to a group -- a jury of laymen
24 that possibly the defendant has been something less than
25 perfect in other matters, then maybe we just ought to convict

him of this matter whether or not the elements of this specific crime have been proved against him.

THE COURT: I'm not sure I understand you. If you're saying that as you view the law, prior similar acts are never admissible because they might be prejudicial, obviously, that's not the law.

MR. MCGOWAN: Your Honor, Mr. Hartmere isn't talking about prior similar acts, he's talking about subsequent similar acts.

THE COURT: Well, there is law as to both, prior and subsequent.

MR. MCGOWAN: Could I -- may I ask the Court for the citation of the Second Circuit opinion which discusses this?

THE COURT: I don't think I need to do legal research on this.

MR. MCGOWAN: I just thought if there were a case, I would like to look at it myself overnight and see if I couldn't be perhaps better prepared. I know your Honor said there's been some dispute within the Second Circuit.

THE COURT: No, I was -- well, I don't know why the communication seems to be so difficult. The only reference I made to the Second Circuit all day was to their decision on requiring a list of witnesses, it had nothing to

do with the rules about similar acts.

MR. MCGOWAN: I'm sorry, your Honor. I thought there had been a citation of some case by MR. Hartmere to your Honor which you Honor had commented on. I'm sorry.

THE COURT: No, he hasn't cited any case to me on this, but there are many cases in the circuit -- and, indeed, in all circuits -- on prior similar acts. It's not a very startling doctrine. Perhaps this circuit is a little more --

MR. MCGOWAN: Mr. Hartmere's not going to limit it to the prior situation, I understand.

THE COURT: He wants to offer prior and subsequent acts to show that in fact Mr. DiMaio was involved in transactions to purchase other people's trifecta tickets.

MR. MCGOWAN: Which is exactly what's prejudicial about it. Because the inference is if he did it previously, then it's more likely that he did it subsequently and that's the wrong inference for the jury to draw.

THE COURT: I disagree with you saying that's the wrong inference.

MR. MCGOWAN: If the question were one of negligence or something like that, the prior act is relevant to show intent or state of mind. That's my understanding of the law.

THE COURT: Well, that's an element of this case, too, which, apparently, you are disputing. When you cross-examined the agents at great length to put in issue whether they could even see a trifecta ticket, presumably one of the things you want the jury to do is conclude that he didn't buy a trifecta ticket and that the farthest thing from his mind was sending someone else to cash a trifect ticket.

MR. MCGOWAN: That is not our theory.

THE COURT: That isn't what you went through with them?

MR. MCGOWAN: Our theory is that he did not know what was going on at a window 50 feet away. That is what I shall argue to the jury on the facts, he didn't know what was going on 50 feet away.

THE COURT: Well, that's another question, whether he knew of the misrepresentation, but before we ever get to that, we have the first question: did he even know about the negotiation of a trifecta ticket.

MR. MCGOWAN: Well, as I say, your Honor, I don't think I have to take a particular theory of defense.

THE COURT: You don't, and I'm not suggesting you should, I'm simply pointing out to you that, having taken a particular theory --

MR. MCGOWAN: But, I haven't.

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3 THE COURT: Well, you cross-examined the
4 witnesses --

5 MR. MCGOWAN: With the point --

6 THE COURT: -- at some length.

7 MR. MCGOWAN: With the point of view of shaking
8 their credibility for the jury generally, yes.

9 THE COURT: Well, when you say "generally,"
10 there was a very specific inquiry. You certainly came at
11 them -- as you're entitled to -- challenging whether or not
12 they are to be believed when they say that they saw the de-
13 fendant negotiating the purchase of a trifecta ticket. Now,
14 that's a fact the government wants the jury to believe. That's
15 part of their chain, to show that the same trifecta ticket
16 ended up being presented and was the subject of a false 1099.

17 Now, you challenge that. You said, "How do
18 you know it's a trifecta? You don't even know the color. You
19 were far away and you were putting mustard on your hot dog."
20 We spent a lot of time on that.

21 MR. MCGOWAN: All legitimate questions. There's
22 no theory behind it, your Honor, other than the witnesses are
23 not to be believed. That's the whole theory. There's no
24 specific theory, and I'm not required to advance a specific
25 theory.

THE COURT: I'm not suggesting you are. But

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2 on the other hand, I don't have to sit here as if I can't
3 understand what's going on, and the plain purport of that
4 questioning to anyone with ears, whether it be me or the
5 jury, was that they were being persuaded by you to conclude
6 that it was not a trifecta ticket.

7 MR. MCGOWAN: Absolutely not. That they were
8 in no position to determine what it was. That's my whole
9 point. They were not in a position to determine what it was,
10 they were too far away and they couldn't hear the conversation.

11 THE COURT: And, therefore, you want them not
12 to agree with the government that it was a trifecta ticket.

13 MR. MCGOWAN: I want them to say that the
14 factual elements in the government's case rests on something
15 that is questionable, that's all.

16 THE COURT: All right, put it that way.

17 MR. MCGOWAN: No specific theory, I don't take
18 any specific theory except the defendant hasn't been proved
19 guilty, that's all my theory is, and that's all I'm required
20 to -- the only theory I'm required to propound.

21 THE COURT: Well, the fact remains whether you --
22 however you categorize it, that your cross-examination put
23 in issue in a very precise way whether the agents were right
24 saying that this defendant had negotiated the purchase of
25 a trifecta ticket, the very ticket that turned up at the

1 window. You cross-examined on several points. You challenged
2 their observation, you challenged whether the man who negoti-
3 ated the ticket put the money in his pocket, whether that was
4 the same money that went back to Mr. DiMaio.
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6 MR. MCGOWAN: Judge, there is no theory behind
7 cross-examination except the theory of depreciating the wit-
8 ness' testimony. I am not here to advance a particular theory
9 other than the defendant hasn't been proved guilty. That's
10 all my theory is. I don't take any particular theory. I am
11 not going to be confied to one.

12 THE COURT: Well, it may be, you know, that
13 you don't understand what I'm trying to say to you.

14 MR. MCGOWAN: Well, I think I do.

15 THE COURT: Well, then, if you do, we shouldn't
16 nave any difficulty.

17 MR. MCGOWAN: Yes.

18 THE COURT: Because I'm not limiting you to
19 any theory at all, I'm simply observing that the cross-examin-
20 ation you have conducted challenged the government on specific
21 points and it was done after the government indicated that
22 they had some other evidence to prove certain points, and I
23 said I'm not going to let them do that unless the need arises.
24 Now, the need has arisen.

25 MR. MCGOWAN: I realize the matter's within

your Honor's discretion, all I ask the Court to consider is the very great prejudice that comes to a jury of laymen from saying he did other possibly bad acts on other days and on other occasions, therefore, there's a likelihood that he did this on this day, which is a wrong inference, and which I think the Court should caution the jury against -- about.

THE COURT: Well, you can be sure there will be appropriate cautions.

MR. MCGOWAN: And, also, of course, your Honor, I point out again this man's name was not on the witness list that you ordered. I think your Honor has not given or focused attention at all on the point the government give us a specific list months ago of witnesses, and now they say forget it, they're going to expand that. I don't think that's fair or proper and I don't think it's due process in a criminal case.

THE COURT: Well, that's the next question: whether you need any time to meet their evidence.

MR. MCGOWAN: Well, I don't know what this man is going to say, other than the fact that this man that -- that our defendant presumably may have done this on other occasions. As I say, if the issue were one of negligence or something like that, or knowledge how to produce, it would be relevant, but it's not relevant here in this particular case, because the only inference I can see the jury drawing

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from this evidence is the one that he was a bad man on other occasions, therefore, you should draw the inference he's a bad man on this occasion.

THE COURT: It's certainly not offered to prove he's a bad man.

MR. MCGOWAN: That's the danger. That's the danger.

THE COURT: Well, there's that danger with every prior or subsequent similar act. So we can put to one side, if that's your argument, that it should never be done, because that's just not the issue.

MR. MCGOWAN: Well, may the Court direct the government, then, to provide for me the criminal record of this man who's going to appear, if he is going to appear, so I will have some opportunity overnight to get ready.

MR. HARTMERE: I will provide him with the criminal record and all previous statements of the records.

MR. MCGOWAN: And his grand jury testimony, if there is any, so I'll have a chance of cross-examining him?

THE COURT: Well, if the government is willing to.

MR. MCGOWAN: Well, I just say that the rug has been pulled out from under us. The government could have advised us of this. I don't think the Court is putting Mr.

Hartmere on the spot on that point.

THE COURT: Well, you see, I have asked you twice, now, about whether you think you need more time, so when you say the rug is pulled out from under you, I'm not pressing you to meet their evidence instantly. What I'm trying to find out is whether you want more time to meet the evidence.

MR. MCGOWAN: Well, I'll have to wait until I hear it before I know that.

THE COURT: All right.

MR. MCGOWAN: We've been working on this case off and on for a good many months, but this man's name was never mentioned up until this weekend.

MR. HARTMERE: Well, I went through it this morning, your Honor. Mr. Brochu's name was on the original witness list in a companion indictment and I advised Mr. McCowan on Friday, and by his own admission he didn't know of any other witnesses either, that this man would be a witness. I advised him specifically that there would be subsequent and prior acts that I would be trying to elicit. I fail to see the prejudice, or that he's advised the Court of any.

MR. MCGOWAN: I think we all know where the prejudice lies. The cases are full of statements to where

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2 the prejudice lies. I don't dispute that there may be some
3 relevance, and that's a matter strictly for your Honor's dis-
4 cretion, what I also say is, it's also a matter for your
5 Honor's discretion to ask whether the prejudice to the de-
6 fendant, which you can never wipe out of the jury's mind, is
7 sufficient to outweigh the slight benefit of relevance that
8 the government is seeking to secure here.

9 THE COURT: Well, frankly, I think that's a
10 fairly easy question. The prejudice is not very extensive.
11 This isn't as if he were proving some outrageous conduct of
12 an inflammatory nature that's liable to arouse the passions
13 of the jury. I don't think purchasing someone's trifecta ticket
14 is liable to arouse anyone's passions.

15 MR. MCGOWAN: Well, the government is calling
16 this a felony, so that's rather serious from our point of view.

17 THE COURT: Well, of course, the offense is a
18 felony, and if they were trying to prove up the offense by
19 eliciting inflammatory prior acts, that would be one thing,
20 but it's not. But as I understood, they want to prove on
21 other occasions this defendant was part of a transaction to
22 purchase other people's trifecta tickets and have them negoti-
23 ated.

24 MR. MCGOWAN: Which is exactly why it's objection-
25 able. It isn't being offered to show knowledge or lack of

negligence, it's just being shown -- it's just being offered. to show he's a bad fellow, that's all. "Generally, he's a bad fellow, ladies and gentlemen, therefore, let's convict him of anything, including the specific charge we have here before us."

THE COURT: Well, Mr. McGowan, you can make that argument, but, frankly, it isn't a persuasive argument, to just say that you think they're doing it to show he's a bad fellow.

MR. MCGOWAN: I don't see any other reason given to the Court.

THE COURT: Well, I have tried several times to explain it to you, that it was to meet your cross-examination to show what was happening on that occasion.

MR. MCGOWAN: My cross-examination was solely directed to diminishing the credibility of the witnesses.

THE COURT: Of course it was, and they want to show that their credibility is good on this transaction, that in fact what they say occurred is what occurred, and they want the jury to reach that conclusion and not to speculate "Could they see it? Was it gray? Was it handed flat or vertically?" by proving that this is a regular occurrence. I just don't understand why there's so much difficulty in understanding that.

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3 In any event, the balance between relevance
4 and prejudice is, I think, fairly clearly on the government's
5 side in view of the cross-examination, and what I'm trying to
6 find out is whether you feel you need time to meet it. Now
7 you say you have to hear it before you know that.

8 Can you make an offer of proof that can suf-
9 ficiently inform the defendant what the testimony will be?

10 MR. HARTMERE: Yes, I can, your honor. I
11 thought I did that this morning. Mr. Brochu's testimony will
12 center around 12 other Form 1099s. I have all the -- every-
13 thing we have on him, including his record, which I will give
14 to Mr. McGowan tonight.

15 THE COURT: What is his role? Is he a bettor?

16 MR. HARTMERE: He is an individual who cashed
17 trifecta tickets which he got from Louis DiMaio or Arthur.

18 THE COURT: Played the same role that Collins
19 played in this transaction?

20 MR. HARTMERE: Basically. In this transaction
21 Collins had false identity and cashed it himself, and whereas
22 in the other transactions, Mr. DiMaio just got Mr. Brochu to
23 sign his own name, and Brucho was given a small amount of
24 money by Mr. DiMaio for doing that. So Mr. DiMaio's name
25 didn't appear on any --

THE COURT: So the issue of false identification

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doesnt enter into this man's testimony?

MR. HARTMERE: No, no. Not at all.

THE COURT: It's simply -- it's corroborative that Mr. DiMaio is involved in having people take other people's trifecta tickets and negotiating them and signing the 1099 as it was their winnings?

MR. HARTMERE: That's right. And that they derived income from it.

THE COURT: Now you know what the testimony is going to be. Now, the question is do you feel you need time to meet it?

MR. MCGOWAN: To me, it's prejudicial effect outweighs any relevance.

THE COURT: Well, that is as to its admissibility.

MR. MCGOWAN: That's my position. I have nothing more to add to that.

THE COURT: Well, I have indicated to you I think it's admissible for the reasons I have tried to explain to you. Now, the next question has nothing to do with admissibility, it has to do with whether you want additional time to meet this testimony since this witness was not included in the witness list.

MR. MCGOWAN: What I want rather than time is I'd like the Jencks material, any grand jury testimony he has,

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2 his criminal record, the material we'd be entitled to in any
3 event, but I'd like it now.

4 THE COURT: Well, he's already said he'll give
5 that to you.

6 MR. HARTMERE: It's in his hands right now.

7 THE COURT: That's what you're getting.

8 Now, all right, having received that material,
9 is it your view that you don't want to continue?

10 MR. MCGOWAN: Your Honor, really, you don't
11 expect me to get through in five minutes and give this Court
12 any kind of conclusive answer? If I were, I'd be the rashest
13 man alive. There must be 35 pages of material. I will go
14 over it in great detail this evening, like I should. I will
15 do my best with it, because we are all anxious to get this
16 matter completed. But I cannot answer that question. Nor
17 could anyone answer that question.

18 THE COURT: Well, I don't know that it's that
19 impossible. Presumably, you know what you have done about
20 other witnesses.

21 MR. MCGOWAN: If your Honor would like to look
22 over that material, I'm sure you'll agree with me.

23 THE COURT: Well, I don't need to look it over.
24 Presumably, you can now estimate the time you spent investigat-
25 ing the other witnesses in a similar situation.

MR. MCGOWAN: No, I cannot estimate the time for this Court that it will take me to go through this material.

THE COURT: I'm not asking you that, Mr. McGowan. I didn't ask you to go through the material instantly. It does seem to me not so extraordinary that since you have been told this man plays a role very similar to Mr. Collins' role, you probably have some idea how long you needed to investigate Mr. Collins -- if any.

MR. MCGOWAN: Mr. -- not Mr. Collins, I mean Mr. -- whatever his name is. I don't even know it. Collins is the man who was mentioned here today.

THE COURT: That's correct.

MR. MCGOWAN: Brochu.

THE COURT: That's right, I understand that, but since he plays a role almost identical to Mr. Collins, I don't see why it's so startling to think that you can't use that as a measure of how long you need to investigate.

MR. MCGOWAN: I'm afraid I must disagree with your -- completely disagree with your Honor about my ability to make that estimate.

THE COURT: Well, all right. So apparently you are going to advise us in the morning whether you want a chance to answer.

MR. MCGOWAN: I am going to do my best to see

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2 that the case is completed tomorrow. This man has got limited
3 resources. We also have limited resources in time, we can't
4 be dragging this thing out forever, and we're going to try to
5 complete it. If we had had this material three months ago, we
6 wouldn't have the problem. But I refuse to take responsibility
7 for the situation as it has arisen.

8 THE COURT: Well, I don't know what that means,
9 Mr. McGowan. You're his lawyer and you certainly aren't going
10 to disclaim responsibility for anything in this courtroom that
11 affects the defense of this man.

12 MR. MCGOWAN: I refuse to make impossible
13 estimates.

14 THE COURT: Well, are you -- well, at the moment,
15 are you requesting a continuance?

16 MR. MCGOWAN: No. No, I am not, your Honor.

17 THE COURT: All right. We will resume tomorrow
18 at ten o'clock.

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1 MR. MCGOWAN: Your Honor, the Defendant now
2 moves for a judgment of acquittal with respect to
3 both counts.

4 With respect to the first count which
5 alleges a violation of 72062, that is aiding and
6 abetting in the preparation of a false form 1099,
7 which I take to be an official 1099 authorized
8 by the Commissioner of Internal Revenue, I'd
9 like to point out to the Court that the testimony
10 of the track itself, Mr. Walsh in particular, was
11 that the track's practice was simply to ask for
12 the identification of the person who stood before
13 the cashier.

14 There was no request that the winner -- I
15 put the word "winner" in quotes -- be identified.

16 Now, as I understand the theory of Count One,
17 is the charge that the Defendant knew Kubesh was
18 the winner or the real owner and he should have
19 introduced Kubesh's name on the form 1099.

20 If I am correct in that interpretation of
21 Count One, and I believe I am, the fact of the
22 matter is that the track, in this instance, filled
23 out all of the forms except the signature, and
24 the only person whose signature they requested
25 was the signature of the person who stood before

1 the window.

2 Now, I think the evidence, all of the evidence,
3 in fact, even the Government's evidence, all the
4 agents indicate that the ticket that they believed
5 that they contend was the one in question here,
6 was signed at a window which was some 50 feet away
7 or approximately 50 feet away. There's a little bit
8 of indefiniteness about the distance from where the
9 Defendant was. In other words, there is no persuasive
10 evidence that the Defendant was responsible for
11 the preparation and the signing and the execution of
12 that Form 1099.

13 THE COURT: Well, I disagree with you. There
14 is evidence that he's responsible for it. If by
15 responsible you mean he wasn't there at the window
16 giving instructions, I agree with you, but if your
17 point is he's not legally responsible, I disagree
18 with you.

19 MR. MCGOWAN: I submit the evidence shows
20 he would not have known what was taking place up
21 at the window. The Government's evidence would
22 indicate that he was not aware of what was taking
23 place up at the window. There is no indication
24 of what was said at the table before Collins or
25 Smith walked up to the window and apparently

1 Collins or Smith did what was done up there without --
2 at least there's no evidence that Collins or Smith
3 told the Defendant what was going to happen up at
4 the window. In other words, the window performance
5 was a performance that was between Mr. Collins or
6 Smith, whatever his name may be, and the cashier,
7 Mr. Walsh, and there's no evidence in addition that
8 the Defendant knew that Smith wasn't Smith.

9 In other words, apparently Smith --

10 THE COURT: He knew Smith wasn't Kubesh.

11 MR. MCGOWAN: There's no question about that.

12 THE COURT: That's enough to go to the jury
13 on. He acquires a ticket from one man, hands it to
14 another man, sends that man up to the window and the
15 man brings him back the money and he pays him his
16 little commission for doing that chore.

17 MR. MCGOWAN: But the 1099 form that was
18 used doesn't ask for identity of the winner. It
19 just asks for the identity of the payee of the
20 amount and that is certainly interpretable by
21 the average person, I think by most people, as
22 being the payee, not the person who may ultimately
23 be entitled to it.

24 Now, fully, if you look at the scheme that's
25 been set up by the Internal Revenue Service, that's

1 completely consistent with the scheme set up by
2 the Internal Revenue Service. The Internal Revenue
3 Service is apparently interested in finding out who
4 gets the cash at the window, not the true winner,
5 because if you read the instructions for Form 1096,
6 which are in evidence, the very first paragraph of
7 that -- of those instructions indicate that if the
8 person is the nominal winner or the record winner,
9 if you read the first paragraph in conjunction with
10 the last paragraph, if the person who receives the
11 money at the window is the nominal winner or the
12 record payee, then that person has a duty by February
13 28 of 1977, which hasn't yet arrived, to file another
14 Form 1027.

15 THE COURT: But there's no evidence that that's
16 so. I could follow you if what happened is Mr.
17 DiMaio and somebody else were both partners on a
18 ticket and he said to the partner, why don't you go
19 up and cash it, we're in here 50/50, and the partner
20 cashed it and signed his name and then later on
21 they filed the necessary information to make it
22 clear they were partners.

23 That's not this case. We don't have to worry
24 about what would happen if the presenter had an
25 interest in the ticket. He's not the winner at all.

1 There's no evidence in this case --

2 MR. MCGOWAN: There's no evidence what was
3 the ownership interest in this ticket?

4 THE COURT: Certainly there's evidence. Kubesh
5 told us exactly what happened. He and three friends
6 of his.

7 MR. MCGOWAN: He disposed of it prior to
8 cashing it. There's nothing on the face of the
9 ticket which says that you can't sell the ticket.

10 THE COURT: No.

11 MR. MCGOWAN: Or you can't buy the ticket.
12 The only question is what was the intent at the time
13 and does the evidence show that the Defendant was
14 the man who bought the ticket, and there's only one
15 person who really testified to that effect, one agent,
16 Mr. Weber.

17 THE COURT: Is your point evidence is insufficient
18 because only one witness testified to it?

19 MR. MCGOWAN: No. What I'm saying is, there's
20 no -- we don't know what was in their minds with
21 respect to --

22 First of all, the evidence is unclear as to
23 who was the actual owner.

24 THE COURT: I don't think it's unclear at all.
25 I don't even think it's in dispute.

1 MR. MCGOWAN: It certainly is in dispute.

2 THE COURT: The witness said that he bought
3 the ticket and pooled his own funds and three of his
4 friends, I think it was from where he worked or
5 something of that sort. In any event, it had nothing
6 to do with Mr. DiMaio and nothing to do with Collins.
7 It was just three friends of the bettor. That's
8 the evidence on who bought the ticket, and I have
9 yet to hear any challenge to that.

10 MR. MCGOWAN: Well, he sold the ticket before
11 it was cashed, so obviously he wasn't the owner at
12 the time it was cashed.

13 THE COURT: We're not worrying about nice
14 points of property law as to whether it was a
15 transfer of ownership or ailment or what it was.
16 The inferences flowing from the transaction are
17 certainly clear enough to go to the jury as to
18 what that transaction was all about.

19 MR. MCGOWAN: Let me go onto the second count,
20 the alleged conspiracy count with Mr. Kubesh.
21 What I've said so far relates to Count One.

22 Mr. Kubesh's own testimony indicates that
23 whoever bought the tickets from him, and he had
24 no conversation at all, they didn't talk, there
25 was just money paid. The ticket was thereafter

1 cashed or we believe it was cashed. If the evidence
2 links the Collins' cashing with the original one,
3 there's some disputed evidence of that, but in any
4 event -- or there will be an argument made on that
5 point. There's no evidence of any conversations
6 between Kubesh and the Defendant certainly and no
7 evidence of any conversation between Collins and
8 the Defendant as to defrauding the Internal Revenue
9 Service or as to putting down something on the form
10 that wasn't accurate or as to misleading the Internal
11 Revenue Service in any way, shape or form.

12 At least, there's no evidence linking DiMaio,
13 the Defendant, with that practice, and the fact
14 that the Defendant DiMaio filed a number of forms
15 1099s himself in his own name indicates that he was
16 aware of what to do and that he was doing it.

17 THE COURT: That's exactly the point, the
18 fact that he's filed 1099s is abundant evidence
19 from which the jury can infer that Mr. DiMaio
20 understands that the person who goes up to that
21 window with the ticket and turns it in and gets
22 the money is the person whose name is going to
23 appear on the 1099. The evidence establishes
24 that. So, it's certainly reasonable to infer that
25 when he then arranges to buy the Kubesh ticket and

1 sends Mr. Collins up to the window, he knows
2 exactly what's going to happen.

3 MR. MCGOWAN: That's, of course, interpreting
4 the evidence in the Government's way, which I
5 suppose is something you can do in this situation.
6 I made my argument.

7 I also want to say to the Court that I have
8 cited the Levy case to the Court and the Levy
9 case is, of course, a case by the Fifth Circuit,
10 a prominent circuit in this country, a big one,
11 and the facts -- of course, that involves 72061,
12 but the language that's involved in 72061 about
13 a return claim or other document is quite close to
14 the language which appears in 72062.

15 There's a little amplification as between the
16 two. I don't know which is the broader, but my
17 point is that the Levy case indicates that it is
18 only if a person makes a misrepresentation on an
19 officially prepared form that he becomes liable for
20 a Federal felony.

21 Now --

22 THE COURT: I understand that point and I
23 understand why you submitted Levy. I don't think
24 it gets you a dismissal in this case.

25 MR. MCGOWAN: May I just point out to the Court.

1 I don't know if your Honor has had the opportunity
2 to look through the exhibits, I'm sure you haven't,
3 but if you look at the Revenue Bulletin which has
4 been put in evidence, Revenue Procedure 14, there's
5 a very specific procedure put in there about
6 modifying the official form 1099 and the official
7 procedure is this. They say you can use only an
8 exact replica of Form 1099 unless, if you want to
9 change it, you must submit your statement or your
10 explanation to a specific office in Washington,
11 D. C. in the Office of the Commissioner of Internal
12 Revenue with a statement of why you have to make
13 the changes plus a statement of the number of
14 copies that are going to be affected.

15 Now, this shows to me that the people who run
16 the Internal Revenue Service don't want to be
17 harassing people, the public at large, with forms
18 and documents that haven't been examined or haven't
19 been approved by the Commissioner of Internal
20 Revenue, and I think this ties in with the Levy
21 case.

22 THE COURT: If the issue were whether the
23 Defendant was in default of some obligation to
24 file a required form, I could appreciate the force
25 of your argument. I don't know it would carry the

1 day in that situation but it would be a strong
2 argument. He's not on trial for failing to file
3 a required form. He's on trial for misleading the
4 Internal Revenue Service and there are cases in
5 our Circuit where the document which was falsified
6 isn't a 1099 at all. It's a track -- I think in
7 one case it's called, is it, a specification or
8 something like that but it's not the 1099. It's
9 just the track's own piece of paper that they use
10 to indicate who came to the window and presented
11 himself as if he were the winner.

12 MR. MCGOWAN: I don't think those were viola-
13 tions or alleged violations of 76062, your Honor.

14 THE COURT: Our Circuit says there were.

15 MR. MCGOWAN: There are other cases involving
16 factual situations such as we have here but they
17 involve other statutory provisions.

18 THE COURT: I'm talking about this very
19 Statute 72062.

20 MR. MCGOWAN: I'd be delighted to know the
21 name of the case that your Honor has in mind so I
22 could disabuse myself of the notions that I
23 apparently have at the present time.

24 Let me say one other last point. Of course,
25 this is a technical argument but an important point

1 here and that is that the indictment refers to
2 Form US Information Return Form 1099 and the
3 indictment also says it is for the calendar year
4 1976.

5 Now, this form, your Honor, is not a form
6 that this man was required to give at that moment
7 because -- in other words, take the average person
8 who gets a form 1099 from his bank or from his
9 corporation in which he's a shareholder. He gets
10 that form for the calendar year and that's what's
11 involved in this indictment language, but somebody
12 decided, I don't know who it is, somebody decided
13 what we'll do is we'll abandon the annual Form 1099
14 form which covers a whole year and instead we'll
15 use our own form required on each specific occasion.

16 THE COURT: This is the variance point that
17 came up a little earlier.

18 MR. MCGOWAN: It isn't authorized by the
19 United States Government, your Honor.

20 THE COURT: I don't know any requirement
21 that it has to be.

22 MR. MCGOWAN: Because the law involved which
23 your Honor mentioned this morning, the law that
24 requires the recording of \$600 or more, and that's
25 what this 1099 stems from, definitely it stems from

1 that 6041 Section that your Honor refers to,
2 talks about compliance with the regulations of
3 the Secretary and his delegate on such forms
4 as they prescribed.

5 THE COURT: It's back to the same problem.
6 He's not on trial for failing to file a required
7 1099. He's on trial for participating in the
8 presentation of a document that is false and it's
9 not just a document in the air, it's a document
10 that has to do with the collection of revenue.

11 MR. MCGOWAN: That's what Mr. Levy did, too.
12 He filed a false document.

13 THE COURT: He was charged with 72061 and the
14 Court said that where you yourself subscribe to
15 a particular document, a required document, then
16 you're charged under 72061 that that very document
17 has to be the one prescribed by the regulation.

18 I don't know if our circuit would follow that
19 decision or not but I don't have to worry about
20 that because that isn't the charge here. The charge
21 here is 72062 which covers other documents not
22 merely returns and similar statements.

23 It covers affidavits, whether or not they're
24 required documents.

25 MR. MCGOWAN: This is not an affidavit, of

1 course.

2 THE COURT: This is just a document but it...
3 is a document that has to do with the collection
4 of Internal Revenue.

5 MR. MCGOWAN: I just want to add one other
6 point, your Honor. The term statement or other
7 document, it seems to me, if used generously,
8 would apply here. This is not a return because
9 the return -- your Honor, if you read the Revenue
10 procedure, they say this 1099 is supposed to be
11 filed on an annual basis and the 1099s aren't
12 supposed to go in until after a date in September.
13 There's a filing. Between September and February
14 28 of 1977.

15 THE COURT: The short of it is it's a
16 sufficient document such that its falsification
17 of the material matter is a crime within the
18 meaning of 72062.

19 MR. MCGOWAN: I realize your Honor has
20 great leeway on this motion but I wanted to make
21 clear my points.

22 THE COURT: Are you ready to proceed with
23 your defense?

24 MR. MCGOWAN: No. I don't believe we'll be
25 putting on any witnesses. I assume that my one

1 motion for acquittal will be sufficient to -- in
2 other words, I won't have to repeat because I
3 won't be putting on any witnesses. In other words,
4 your Honor, I assume is denying my motion?

5 THE COURT: Your motion for directed verdict
6 is denied.

7 MR. MCGOWAN: I don't want to be redundant.

8 THE COURT: You mean at the end of the Govern-
9 ment's case and at the end of the entire case. You
10 have covered it at both stages.

11 MR. MCGOWAN: Thank you, your Honor.

12 THE COURT: All right. How long do counsel
13 expect their arguments will be in this case?

14 MR. HARTMERE: I can be fairly brief, I
15 think, your Honor, probably 15 or 20 minutes
16 initially and maybe 15 -- and maybe 15 rebuttal.
17 I would think in half an hour I would do it.

18 THE COURT: What do you think you need?

19 MR. MCGOWAN: I'd like more than that, your
20 Honor. It's hard for me to estimate it because I
21 don't know exactly what Mr. Hartmere is going to
22 dwell on but I would like to ask the Court for an
23 hour. I will try to make it shorter than that.

24 I understand Mr. Hartmere will go first and
25 I will follow and he comes back for rebuttal.

1 THE COURT: That's correct.

2 MR. MCGOWAN: I assume your Honor will advise
3 us about the request for instructions before we
4 argue?

5 THE COURT: Yes, I will.

6 MR. MCGOWAN: I'm particularly concerned
7 about the willfully instruction, your Honor, and --

8 THE COURT: Your Number 20?

9 MR. MCGOWAN: Yes.

10 THE COURT: Well, I doubt if I'll use that
11 language in this case. That phrasing is generally
12 given in the context of a failure to file prosecution
13 where the essence of the offense is failing to do
14 something that's required.

15 In that context, it isn't willful unless you
16 knew you had to do it. That isn't the allegation
17 here.

18 MR. MCGOWAN: The allegation is willfully and
19 in the Ponponeo case, the Supreme Court says willfully
20 has a uniform meaning in the Internal Revenue Code
21 and I quoted it there.

22 THE COURT: They said it has a uniform meaning
23 under the entire Code.

24 MR. MCGOWAN: Yes, both misdemeanors and
25 felonies.

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THE COURT: You mean whether it's 7203 or 7201?

MR. MCGOWAN: It doesn't make any difference.

THE COURT: Of course, for that it doesn't but that's rather different than 7206 when you falsify something.

MR. MCGOWAN: You have to know that it was false.

THE COURT: You'd have to know it was false, that's true, but your phrase talks about violation of a known legal duty. You mean the Government has to prove up that he must know you're supposed to be truthful because there can be a false statement prosecution?

MR. MCGOWAN: You are not under an obligation -- what I'm saying in dealing with the United States Government, you have an obligation to be truthful with respect to the matters that are official matters in dealing with the Government, but there's no obligation -- there certainly is no criminal liability attached to a misrepresentation that is not required by the Government.

THE COURT: Well, we disagree on that basic proposition.

MR. MCGOWAN: I request the Court to pay

1 attention to the Ponponoo case, if you will. It's
2 a recent case and I think it resolves matters that
3 were in dispute up until this time.

4 THE COURT: Is it a 4206 case as to the
5 filing of a false statement, submission of a false
6 statement?

7 MR. MCGOWAN: It's a 7206 case. I believe
8 it's a 72061 case, but it's a 7206 case and there's
9 no question, I think if you read the language of
10 the opinion, that they're not limiting willfully to
11 one section, Sub-section of 7206.

12 THE COURT: Well, I really can't believe the
13 Supreme Court is suddenly changing the general rules
14 about fraudulent --

15 MR. MCGOWAN: This indictment uses the word
16 willful.

17 THE COURT: There's no question it has to be
18 willful in the sense that it has to be knowing and
19 deliberate not by accident or mistake.

20 MR. MCGOWAN: Knowing is additional in the
21 indictment, willful and knowing. They certainly
22 aren't redundant.

23 THE COURT: It has to be both. I'll give
24 an instruction on willful but it won't be as
25 limited as yours.

1 MR. MCGOWAN: Could you tell me what you will
2 say on that point, just roughly, so I won't be
3 embarrassed before the jury.

4 THE COURT: It's the usual language that an
5 act is willfully if done knowingly and deliberately
6 and not by accident, inadvertence or mistakes or
7 even negligence.

8 MR. MCGOWAN: Or negligence or gross negligence?
9 The cases go that far, too.

10 THE COURT: There's no question that would not
11 be sufficient.

12 MR. MCGOWAN: Would your Honor indicate to
13 me by paragraphs which will be given and which
14 will not be given?

15 THE COURT: Well, I just have your recent
16 ones. Well, as to your recent ones, I'll give
17 the substance of 19, probably not in those words.
18 I've indicated about 20. I will not give 21.
19 Well, I can't give 22 because that incorporates
20 the same notion that he was violating a legal
21 duty. The only duty in this case is not to
22 endeavor to mislead the Internal Revenue Service
23 in the collection of the revenue.

24 I won't give 23 because I just don't think
25 it's relevant to the issues in this case. We're

1 not concerned with what the duty of the presenter
2 was, whether he should have filed some additional
3 forms. He's not charged with anything and that's
4 not in issue here what his other duties were. I'll
5 give the substance of 24. If you have it yourself
6 there I can tell you about the others.

7 MR. MCGOWAN: Yes, I have them here.

8 THE COURT: Do you want me to tell you from
9 that copy?

10 MR. MCGOWAN: All right.

11 THE COURT: I'll tell them Number 1.

12 MR. MCGOWAN: What's that, please, sir?

13 THE COURT: Number 1.

14 MR. MCGOWAN: You'll give 1. In other
15 words --

16 THE COURT: Yes. That it's two counts, yes.
17 I'll tell them that. Your Number 2 simply summarizes
18 the count. I'll either read it to them or summarize
19 it. Same with your Number 3.

20 MR. MCGOWAN: Your Honor, I might point out
21 that that hasn't been done in this case. The jury
22 has gone through the whole case without hearing
23 the indictment.

24 THE COURT: We never tell them the indictment
25 until the close of the evidence. There may be some

1 charges that go out. I don't want to put charges
2 to them in the middle of a case that may not be
3 given to them at the end.

4 So, there's nothing unusual about that.
5 They'll have the indictment in the jury room
6 since both counts are remaining in the case, so
7 they'll have a full opportunity to see it.

8 I'll give them your request Number 4 and
9 the substance of Number 5, probably not that wording.
10 I'll tell them Number 6 and 7 and the usual language
11 about 8, presumption of innocence and the Government's
12 burden. Your Number 10 I'll either read or para-
13 phrase that statute. I don't really see the virtue
14 of reading them Section 6041, frankly.

15 Well, the balance of them seem to really be
16 an effort to put your legal argument to the jury
17 and I don't think that's a jury question as to --

18 MR. MCGOWAN: Which paragraphs are those,
19 your Honor?

20 THE COURT: Well, the balance of them, all
21 seem to be part of the development of your argument.

22 MR. MCGOWAN: What paragraphs? I don't have
23 the copy?

24 THE COURT: Well, it's 12 through 18, all
25 deal with which is the required form, and I'm just

1 not going to put those legal propositions to the
2 jury. I think those are matters of law.

3 MR. MCGOWAN: With respect to the Government's
4 instructions?

5 THE COURT: Well, as I recall, they didn't
6 submit anything dealing with the elements of the
7 events. It was all rather standard language about
8 burden of proof and circumstantial evidence and
9 matters of that sort. I'll generally cover those
10 topics, probably not in their wording but similar
11 language. Is that clear?

12 MR. MCGOWAN: Thank you.

13 THE COURT: Well, then it looks like we won't
14 be able to charge the jury today but we can have
15 the arguments. So, we'll take a recess and complete
16 the arguments.

17 MR. HARTMERE: While we're here on that,
18 since I have to be at the Court of Appeals
19 tomorrow, shall I just have somebody else sit
20 in here for the charge?

21 THE COURT: Yes.

22 MR. HARTMERE: Thank you.

23 (Recess.)
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25

1 THE COURT: Well, all right. So the record
2 is clear, the cases that indicate that a violation of 72062 is
3 made out, even if the form that the cashier signs is not a 1099,
4 but is a track slip, our United States against Kessler --

5 MR. MCGOWAN: May I have that citation, your
6 Honor?

7 THE COURT: Yes. 449 Fed. 2nd, 1315. And
8 also United States against Heimowitz, 404 Fed. 2nd, 38, both
9 in this Circuit. 404 Fed. 2nd, 38.

10 Now, to the extent the defendant's argument is
11 that there has been no falsification because the person who
12 received the money, in this case, Mr. Kuhesh, signed the form --

13 MR. MCGOWAN: No, he did not sign the form.

14 THE COURT: I'm sorry, Mr. Collins -- that Mr.
15 Collins signed the form, and, therefore, there's been no
16 misrepresentation, because he, in fact, got the proceeds, in
17 our Circuit, that argument has been characterized as frivolous,
18 in United States against Meistri at 451 F. 2nd, 1342.

19 I take it what the Court of Appeals means by
20 saying that's frivolous is that a jury is entitled to conclude
21 from circumstances such as they've heard here that sending a
22 cashier who did not, in fact, win on that race, sending him up
23 there to receive the proceeds and have filled out in his name
24 whatever form the track uses is misleading the Internal Revenue
25 Service from knowing who was the winner of that race.

1 And finally, the variance point is covered in
2 United States against Lincoln at 472, 1183, where, as in this
3 case, the indictment referred to an official 1099 and the
4 evidence disclosed a similar form, but one prepared by the track,
5 and, in fact, not the official government form. The Court of
6 Appeals thought that variance was not significant; and in the
7 circumstances of this case, particularly where the exhibit has
8 been known to the defense for some time, so they knew, in fact,
9 the type of document they'd be needing the variance, also is
10 not significant.

11 I think I will add only one aspect to the
12 charge beyond what I indicated to Mr. McGowan. I think I will
13 call to the jury's attention -- to the obligation of 6041, that
14 does not require the payer, in this case the track, to make a
15 report of the money they pay out. So that they'll understand
16 that there is that requirement on the track.

17 All right. Are we ready to argue?

18 MR. HARTMERE: Yes, your Honor.

19 THE COURT: When the jury comes in, Mr. McGowan,
20 I'll -- just before the argument, I'll ask you, or you can just
21 volunteer, that the defendant rests, since that hasn't happened
22 in the presence of the jury, and they're entitled to know that.

23 (Jury entered courtroom.)

24 THE COURT: All right. Mr. McGowan.

25 MR. MCGOWAN: Your Honor, the defendant rests.

1 (Jury entered courtroom at 10:05 a.m.)

2 THE COURT: Good morning, ladies and gentlemen.

3 You have heard all the evidence in the case, and
4 you have heard the summations of counsel. It is my obligation
5 to instruct you as to the rules of law you are to apply in
6 deciding this case.

7 It is exclusively the function of a Court to
8 advise a jury what the rules of law are, and you are obliged
9 to follow them, whether or not they conform to what you think
10 the law ought to be.

11 When it comes to deciding the facts of the case,
12 that's entirely your province. You have heard the evidence,
13 you decide what evidence you choose to believe. You have heard
14 all of it, some of it, parts of it, and from your consideration
15 of the evidence, you decide what the facts of the case are,
16 then apply these rules of law and in that way reach your
17 verdicts.

18 As counsel mentioned, if they refer to any fact
19 that's different than your recollection, your recollection
20 controls, and that applies to any reference to the facts I may
21 make. I don't propose to go into them in any detail. It's
22 been a short trial, but if in order to illustrate a claim, I
23 were to refer to any fact that's different from the way you
24 remember it, you go by your recollection.

25 I caution you to give no concern at all to the

1 fact that counsel for either side may have objected to some
2 matter. They have a responsibility to make sure the rules of
3 evidence are abided by, and that's their function.

4 In considering the evidence in the case, as in
5 any case, you can consider generally two types of evidence.
6 One is called direct evidence. That's what somebody saw or
7 sometimes what somebody heard. The other is what's called
8 circumstantial evidence, and that means facts that are proven
9 from which the jury may infer by a process of reasoning other
10 facts sought to be established as true.

11 Now, of course, there are different inferences
12 that can be drawn from facts, and in some matters, the prosecu-
13 tion suggests you ought to draw one inference, and the defense
14 suggests you ought to draw another inference. It is for you to
15 decide what inferences you think are fair and reasonable to draw
16 from the evidence you heard.

17 Circumstantial evidence can be received and is
18 entitled to such weight as you think it deserves, depending on
19 the inferences you think necessary and reasonable to draw. No
20 greater degree of certainty is required when the evidence is
21 circumstantial than when it is direct. With either type of
22 evidence, there cannot be a conviction on either count unless
23 you're persuaded beyond a reasonable doubt of the guilt of the
24 defendant on that count.

25 In this case, as in every criminal case, the

1 defendant is presumed to be innocent unless and until proven
2 guilty beyond a reasonable doubt. This presumption of innocence
3 was with him when he was first presented for trial, and it
4 continues throughout the trial, and as far as you're concerned,
5 he is innocent unless and until such time as all the evidence
6 in the trial, considered by you in light of these instructions,
7 persuades you beyond a reasonable doubt that the defendant is
8 guilty of the particular charge you're considering.

9 Now, the burden of proving the defendant guilty
10 rests with the government. The defendant does not have to prove
11 his innocence. This means that before you may find the defendant
12 guilty of either count, the government must prove to you beyond
13 a reasonable doubt each and every element necessary to constitute
14 the crime charged. Whether that burden has been sustained
15 depends not on the number of witnesses, nor on the quantity of
16 their testimony, but on the nature and the quality of the
17 testimony.

18 Now, as to reasonable doubt, as the words suggest,
19 it's a doubt founded upon reason. It is a doubt as will be
20 entertained by a reasonable person after all the evidence in the
21 case is analyzed, compared and weighed. A reasonable doubt may
22 arise not only from the evidence produced, but from a lack of
23 evidence. Since the burden is on the government to prove the
24 defendant guilty beyond a reasonable doubt of every element of
25 the crime, a defendant has a right to rely on the failure of the

1 prosecution to establish such proof. However, absolute or
2 mathematical certainty is not required, but there must be such
3 certainty as satisfies your reason and judgment and such that
4 you feel conscientiously bound to act upon. It is not a
5 fanciful doubt or a whimsical or capricious doubt, for anything
6 relating to human affairs and depending on human testimony is
7 open to some possible or imaginary doubt.

8 A reasonable doubt is such doubt as would cause
9 a prudent person to hesitate before acting in matters of
10 importance to himself or herself. So if the evidence warrants,
11 in your judgment, the conclusion that the defendant is guilty
12 so as to exclude every other reasonable conclusion, you should
13 declare him to be guilty. On the other hand, if on all the
14 evidence you have a reasonable doubt as to the guilty of the
15 defendant, you must find him not guilty.

16 Now, this case comes to trial on an indictment
17 and bears the number N-76-95. You will have the indictment with
18 you in the jury room.

19 Before returning to the specifics of it, let me
20 mention the limited function of an indictment. An indictment
21 by a grand jury is simply the formal method of accusing a
22 defendant of certain crimes. It defines the crimes charged and
23 states the manner of their alleged accomplishment. The indict-
24 ment is without bearing or significance in your consideration
25 of the case and is to be accorded no weight in determining

1 whether or not the defendant is guilty. By his plea of not
2 guilty, the defendant has denied each and every allegation in
3 the indictment.

4 Let me explain the reason for that. When an
5 indictment is considered by a grand jury, the government puts on
6 its evidence to the grand jury. The defendant is not there,
7 his lawyer is not there. There is no cross-examination, so
8 whether a grand jury indicts is just without any significance as
9 to what you ought to do. You're the only jury that's heard the
10 whole case, so the indictment is not evidence and is not to be
11 given any consideration.

12 Now, in this indictment there are two counts.
13 You should give separate consideration to each of the two
14 counts. You should not let your verdict on one count influence
15 your verdict on the other count.

16 Let me also make it clear that these two counts
17 are the only law violations that are charged and with which you
18 should be concerned.

19 Count One charges what's called a substantive
20 offense: that is, the actual commission of a crime, and Count
21 Two charges what's called a conspiracy offense: that is, a
22 criminal agreement to commit a crime. I will go into these in
23 some detail with you.

24 Now, as to Count One, it charges a violation of
25 a section of the Internal Revenue Code, and the particular

1 section involved provides as follows: any person who willfully
2 aids or assists in or procures, counsels or advises the
3 preparation under, or in connection with any matter arising
4 under the Internal Revenue laws, of a return, affidavit, claim
5 or other document, which is fraudulent or is false as to any
6 material manner, whether or not such falsity or fraud is with
7 the knowledge or consent of the person authorized or required to
8 present the return, affidavit, claim or document, shall be
9 guilty of a felony.

10 This statute makes it an offense to assist in
11 presentation or preparation of false information in connection
12 with material matters required to be reported under the Internal
13 Revenue laws.

14 Now, another provision of the Internal Revenue
15 Code creates a requirement that certain information be reported
16 to the Internal Revenue Service. That section reads as follows
17 -- I won't read all of it because all is not applicable, but the
18 pertinent part reads as follows: "All persons . . . making
19 payment . . . to another person of rent, salaries, wages,
20 premiums, annuities, compensations, remunerations, emoluments,
21 or other fixed or determinable gains, profits and income, of
22 \$600 or more in any taxable year . . . shall render a true and
23 accurate return . . . setting forth the amount of such gains,
24 profits, and income and the name and address of the recipient
25 of such payment."

1 So in this case there is a requirement that the
2 racetrack inform the IRS whenever the track makes a payment of
3 gains, profits or income within a calendar year of more than
4 \$600. The racetrack must report the amount of such gains,
5 profits or income and the name and address of the recipient of
6 such payment: that is, the payment of gains, profits or income.

7 In this case, there is evidence that the track
8 made a report to the IRS every time they made a payment of
9 winnings in excess of \$600. In other words, they didn't wait
10 until the end of the year, they filled out these forms each time
11 there was a payment in excess of \$600. Exhibit 1 in Evidence
12 is the form on which the track officials say they made this
13 report of the name and address of the recipient of income.
14 There is also in evidence a form quite similar to Exhibit 1.
15 This other form is an official Form 1099 printed by the IRS.
16 Apparently Exhibit 1 is printed by the track. You will note
17 it calls for virtually the same information called for by the
18 official Form 1099.

19 The indictment in this case charges the prepara-
20 tion of U.S. Information Return Form 1099, whereas the evidence,
21 if you accept it, shows the preparation of the form also labeled
22 a Form 1099, but not an official form. The fact that Exhibit 1
23 is not an official Form 1099 is not necessarily a defense to
24 this action, if you find that the elements of the offense, as
25 I am about to explain them, have been established beyond a

1 reasonable doubt.

2 Before I take up the elements specifically, let
3 me read you the count. It alleges in Count One that on or
4 about April 5, 1976, at Plainfield, in the District of
5 Connecticut, Louis DiMaio and John Doe, a/k/a Edward Smith --
6 of course, we are only concerned here with Louis DiMaio --
7 hereinafter called the defendant, did willfully and knowingly
8 aid and assist or counsel, procure and advise the preparation
9 and presentation to the Internal Revenue Service of the U.S.
10 Information Return Form 1099, for the calendar year '76, which
11 was false and fraudulent as to a material fact in that it
12 represented that on April 5, 1976 the said John Doe, a/k/a
13 Edward S. Smith, was the recipient of compensation in the amount
14 of \$1261.80 from payment of a winning pari-mutuel trifecta
15 ticket -- it gives the serial number -- issued by the Connecticut
16 Yankee Greyhound Racing, Incorporated, whereas, as the defendants
17 then and there well knew and believed, Dennis L. Kubesh was the
18 recipient of said compensation from payment of said pari-mutuel
19 trifecta ticket.

20 There are three elements of the offense charged
21 in Count One: First, that the defendant did aid or assist or
22 procure or counsel or advise in the preparation of presentation
23 of a document in connection with a matter arising under the
24 Internal Revenue laws. Second, that the document was false or
25 fraudulent in a material respect. Third, that the defendant

1 acted knowingly and willfully. The gist of the offense is
2 helping to mislead the government in its effort to be informed
3 of the true identity of the recipient of income, in this case
4 racetrack winnings, which are taxable income to the person who
5 places the wager.

6 Let me explain the elements in a little more
7 detail. You will note that the defendant is not alleged to
8 have personally prepared or presented a false document, but
9 rather to have aided or assisted in its preparation or presenta-
10 tion. A person aids or assists an act if he takes some action
11 to bring it about, to help make it succeed, knowing that his
12 action will have the effect of accomplishing the ultimate
13 objective.

14 The government's claim here is that Kubesh and
15 his friends were the winners of the third race, and that the
16 income from those winnings was theirs. The government further
17 claims that the defendant, Louis DiMaio, aided and assisted in
18 the preparation of a false document by buying the winning ticket
19 from Kubesh for about 10 percent less than its value, giving it
20 to a man known as Collins or Smith to cash, and having Collins
21 cash the ticket and bring DiMaio back the proceeds and receive a
22 fee from DiMaio for doing this.

23 The government further claims that this action
24 by DiMaio aided or assisted in the preparation of Exhibit 1.

25 The defense vigorously challenges whether the

1 government's evidence has shown beyond a reasonable doubt that
2 DiMaio did engage in a transactions uch as the government alleges.

3 If you find that DiMaio did buy the ticket from ✓
4 Kubesh and arranged for Collins to go to the window and cash it
5 and have Collins fill out the Form 1099, you would be entitled
6 to conclude that the defendant did aid or assist in the prepara-
7 tion of a document in connection with a matter arising under
8 the Internal Revenue laws.

9 Of course, this element, a s with all elements,
10 has to be proven by the government beyond a reasonable doubt.

11 The second element is that the document be
12 shown to be false of fraudulent in a material respect. If you
13 find that the 1099, Exhibit 1, did not disclose the true
14 identity of the person who had won the race and thereby acquired
15 taxable income, but instead listed the identity of some other
16 person, you would be entitled to conclude that the 1099 was
17 false or fraudulent in a material respect. This element of the
18 offense is established whether Collins used his own name or used
19 the name and identification of an Edward Smith from Flint,
20 Michigan.]

21 Finally, as to the defendant acting knowingly and
22 willfully, which is the third element of the offense, an act is
23 done knowingly if done voluntarily and intentionally and not
24 because of mistake, accident or other reason. An act is done
25 willfully if done voluntarily and intentionally and with the

1 specific intent to do something the law forbids: that is, with
2 a bad purpose either to disobey or disregard the law. It is
3 not sufficient that a person may have acted with negligence or
4 even gross negligence. He must know and intend to do something
5 the law forbids.

6 So, in this case, the defendant must be shown to
7 have acted knowing that the Form 1099 used by the track would
8 be the means by which eventually the IRS would be informed of
9 the identity of the person to whom the racetrack had paid the
10 winnings, and he must be shown to have intended to assist in
11 keeping from the IRS the true identity of Kubesh. The defendant's
12 own experience in cashing winning tickets and signing the
13 track's Form 1099 can be considered along with all the other
14 evidence in the case in deciding whether the requisite knowledge
15 and willfulness have been established.

16 All right. Now, all that concerns Count One.

17 Let me turn to Count Two. There are three
18 elements of the conspiracy offense in Count Two, each of which
19 must be proven beyond a reasonable doubt before there can be
20 a conviction on that count.

21 The first element is -- well, before I do that,
22 let me read you the count so you have it in mind as I go through
23 this.

24 Count Two: that on or about April 5th, 1976, at
25 Plainfield, in the District of Connecticut, Louis DiMaio and

1 John Doe, a/k/a Edward S. Smith, the defendants herein, and
2 Dennis L. Kubesh, a coconspirator, but not a defendant herein,
3 willfully and knowingly did combine, conspire, confederate and
4 agree together and with each other to willfully, knowingly aid
5 and assist in and counsel, procure and advise the preparation
6 and presentation to the Internal Revenue Service of a U.S.
7 Information Return Form 1099 for the calendar year 1976, and
8 to defraud the U.S. of America by impeding, impairing, obstruct-
9 ing and defeating the lawful government functions of the
10 Internal Revenue Service of the Treasury Department of the
11 United States in the ascertainment, computation, assessment,
12 and collection of the revenue to wit: income taxes.

13 Then it says: in furtherance of the conspiracy
14 and to effect the objects thereof, the defendants did perform
15 the following overt acts: One, on or about April 5, 1976, at
16 Plainfield, Connecticut, Louie DiMaio approached Dennis L.
17 Kubesh at the Plainfield Dog Track; Two, on or about April 5,
18 1976, at Plainfield, Connecticut, John Doe, a/k/a Edward S.
19 Smith, signed a U.S. Information Return Form 1099 as a payee
20 of compensation in the amount of \$1261.80 from payment of a
21 winning pari-mutuel trifecta ticket -- it gives the serial
22 number -- issued by the Connecticut Yankee Greyhound Racing,
23 Incorporated.

24 So, as you can see, and as I mentioned before,
25 Count Two alleges a conspiracy, in essence, to commit the same

1 offense alleged in Count One.

2 There are three elements to the offense charged
3 in Count Two, each of which must be established beyond a
4 reasonable doubt. The first element is that the conspiracy
5 charged in Count Two was formed and existed at or about the
6 time alleged. Second, that the defendant DiMaio willfully became
7 a member of the conspiracy. Third, that at least one member of
8 the conspiracy knowingly committed at least one of the alleged
9 overt acts in furtherance of the purposes of the conspiracy.

10 Let me take those up in a little more detail.
11 The first element concerns the existence of the conspiracy.
12 Conspiracy is an agreement between two or more persons to
13 accomplish some criminal or unlawful purpose, sometimes referred
14 to as a partnership in crime. The agreement is the essence of
15 the conspiracy. The agreement is established if you find that
16 two or more persons in any manner through any contrivance,
17 impliedly or tacitly, came to a common understanding to violate
18 the law. Neither express language nor any particular words are
19 needed to indicate that such an agreement was formed.

20 The government is not required to show that two
21 or more persons entered a solemn compact in writing. Indeed,
22 it would be surprising if there were such a formal agreement.
23 Your common sense will tell you that if people are going to
24 joining together to form a criminal conspiracy, much will be left
25 to their unexpressed understanding. From its very nature, a

1 conspiracy is usually secret in its origin and execution,
2 and the agreement entered into need not be elaborate. It is
3 sufficient if an agreement was reached to accomplish the
4 unlawful objective specified in the indictment.

5 In determining whether there has been an unlawful
6 agreement, you can consider the acts and conduct of the
7 defendant of the alleged coconspirators that are done to carry
8 out an apparent criminal purpose. The adage "action speaks
9 louder than words" is often applicable. Sometimes the only
10 available evidence is a series of disconnected acts, which, when
11 taken together, show the existence of a conspiracy.

12 As I said, the conspiracy alleged in Count Two
13 is, in essence, a conspiracy to commit the substantive offense
14 charged in Count One. The fact that the defendant is charged
15 with the substantive offense in Count One does not mean that he
16 may not also be charged with the separate offense of conspiracy,
17 to commit that same substantive offense. As I told you, each
18 offense is separate. The defendant can be found not guilty on
19 either or both counts, or guilty on either or both counts.
20 Whether he is guilty of a count, however, depends on whether
21 each of the elements of that count has been proven beyond a
22 reasonable doubt.

23 The first element of the conspiracy offense can
24 be established only by proof that the particular conspiracy
25 alleged in Count One is the conspiracy that was established.

1 Proof of some other conspiracy will not suffice.

2 The second element is whether the defendant
3 willfully became a member of the conspiracy. To find that you
4 must be persuaded beyond a reasonable doubt that by his words
5 or his conduct, or both, he clearly indicated his decision to
6 join the conspiracy with the specific intention of advancing
7 its objectives, and that he willfully participated in the plan
8 and in some sense promoted the venture himself, or made it his
9 own, or indicated that he had a stake in the venture. On this
10 point, it's important to bear in mind that a defendant's joining
11 in a conspiracy cannot be shown by his mere presence with other
12 members of the conspiracy, even if he had knowledge that there
13 is a conspiracy being formed or existing. Mere similarity of
14 conduct among various persons, and the fact they may have
15 associated with each other and may have assembled together and
16 discussed common aims, does not necessarily establish proof of
17 the existence of a conspiracy. Guilty by association is
18 foreign to our law, and being present with criminals, even if
19 one knows of their criminal activity, does not make a person a
20 participant in a criminal enterprise. One may join a conspiracy
21 without being assigned any particular role, and a defendant
22 can be found to have joined a conspiracy even if he does not
23 know all the members of the conspiracy and does not know all the
24 details of the conspiracy, but there must be proof beyond a
25 reasonable doubt that he knows the objectives of the conspiracy

1 and makes clear his intention to join the conspiracy in order
2 to promote those objectives. And the act of joining must be
3 done willfully, and I have explained to you before what that
4 word means.

5 If you find that the defendant did join the
6 conspiracy, then you can find that he is liable for all of the
7 statements and actions of other members of the conspiracy that
8 are made or taken in furtherance of the objectives of the
9 conspiracy and he is liable even if those statements or actions
10 were made or taken out of his presence. However, a defendant
11 is not liable for any action taken by a coconspirator beyond
12 the scope of the conspiracy he understands he is joining.

13 Now, in deciding whether a defendant -- whether
14 the defendant knew the objects of the conspiracy and intended
15 to promote them, he must be shown to have the same knowledge
16 and the same intent necessary for conviction on the substantive
17 offense in Count One. In other words, don't think that a person
18 can be convicted on a conspiracy count on less proof of knowledge
19 and intent than is required for the substantive offense. Some
20 people have the mistaken idea that one can be guilty of
21 conspiracy if he is just vaguely on the fringes of a criminal
22 venture. That is not so. To be guilty of a conspiracy, a
23 defendant must be shown to be a knowing and willful participant
24 in the agreement to commit the substantive offense, and he must
25 have the same intent required for conviction on the substantive

1 count.

2 The third element concerns the knowing commission
3 of at least one overt act in furtherance of the conspiracy. I
4 read you the two overt acts that are alleged in this indictment.
5 An overt act need not be a crime or an unlawful act in and of
6 itself, but it must be shown to have been done to promote or
7 assist in accomplishing the purpose of the conspiracy. It is
8 not necessary to show that the defendant personally committed
9 the overt act. If any member of the conspiracy committed at
10 least one overt act knowingly and willfully, that's sufficient
11 for the third element of the offense.

12 In deciding whether these elements have been
13 established -- let me -- I think I did mention, those two
14 offenses are the only offenses alleged and the only ones for
15 you to consider. I should also point out that the act of buying
16 or selling a race track ticket at a track, either before the
17 race or after the race, when you know who won, in and of itself
18 is not a crime. The offenses are the two alleged in this
19 indictment, and the elements of them are the ones I have
20 explained to you.

21 All right. Now, you will recall that the govern-
22 ment presented the testimony of Ronald Brochu, and also presented
23 some 1099's that he said he signed. This evidence was offered
24 to show that on other occasions during March and April of '76,
25 the defendant participated with Brochu in efforts to do the

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1 same thing with which the defendant is charged in this indict-
2 ment: that is, assist in the preparation or presentation of
3 false 1099 forms.

4 Now, let me be clear with you as to the use of
5 this evidence. In the first place, obviously, you cannot use
6 it at all unless you first decide you find it credible. In
7 deciding credibility of this testimony, you're entitled to
8 consider all of the evidence in the case. If you find that the
9 defendant did participate in transactions with Brochu, as he
10 described, that evidence can be considered by you in determining
11 whether the similarity of that conduct to the conduct charged
12 in the indictment persuades you that the evidence which the
13 government has offered to prove the offenses charged in this
14 indictment ought to be believed. In other words, if you find
15 the defendant was involved in a common scheme or plan to commit
16 certain acts, you can use that evidence in deciding whether he
17 did the acts charged in the indictment. And you can also use
18 that evidence in deciding whether the defendant had the requisite
19 knowledge and intent that are elements of the offenses charged
20 in this case. But you cannot convict the defendant on either
21 count of this indictment simply because you find he was involved
22 in the activity described by Brochu. Nor can you use that
23 evidence to conclude anything about whether the defendant is a
24 bad man. As I have said, only the offenses charged in this
25 indictment are before you, and it's those offenses that must be

1 proven beyond a reasonable doubt. TheBrochu testimony, if you
2 accept it, can be considered along with all the other evidence,
3 to the extent I have indicated, in determining whether these
4 two offenses charged in the indictment have been established
5 beyond a reasonable doubt.

6 In making your judgment, you will have to give
7 concern to the question of credibility: that is, the
8 "believability", of the witnesses you heard. There are certain
9 considerations you are entitled to have in mind. You can
10 consider the appearance of the witnesses on the stand, try to
11 size them up. Did they appear to be honest? Did they appear
12 to be intelligent? Did they appear to you to be persons who
13 were telling the truth, who would recall what they saw or
14 heard and who would be able to remember it and report it to you
15 accurately?

16 You can consider whether their testimony is
17 plausible. How does it fit in with the other testimony in the
18 case which you heard and decided is credible?

19 You're entitled to consider that a witness'
20 testimony may be discredited or impeached if it's shown that on
21 a prior occasion he said something inconsistent with what he
22 says here in court.

23 You should also bear in mind whether any witness
24 who testified has any bias or interest in the outcome of a case
25 which may have colored his testimony, either deliberately or

1 inadvertently; and, of course, if you find a witness has
2 deliberately lied to you on some matter, you ought to give that
3 serious consideration in deciding whether to believe any of his
4 testimony. Of course, a witness may be mistaken on one point
5 and truthful on all other points, and it's even possible a
6 witness could deliberately lie on one point and be truthful on
7 other points. Those are all matters for you to consider in
8 your judgment.

9 With respect to witness Brochu, there was
10 offered evidence of the fact that on two prior occasions he had
11 been convicted of an offense. You're entitled to consider
12 those prior convictions for whatever weight you think they
13 deserve in assessing the credibility of Mr. Brochu.

14 I should also point out that you heard testimony
15 of agents of the government in this case. Well, you should
16 apply the same considerations to their testimony as you do to
17 all other witnesses. Their testimony is entitled to no greater
18 weight, no lesser weight, simply because they happen to work
19 for the government.

20 Now, there is one further consideration you
21 should have in mind on the issue of credibility. Two of the
22 witnesses who testified: Kubesh and Brochu, have by their own
23 testimony admitted their own participation in the type of
24 criminal conduct that is charged to the defendant. Kubesh
25 admits that he sold his ticket and thereby avoided having to

1 acknowledge to the IRS that he won the race. Brochu admits that
2 he helped other racetrack winners avoid informing the IRS of
3 their winnings by cashing their tickets for them. So both
4 witnesses are accomplices and I instruct you that the testimony
5 of an accomplice should always be viewed with caution and
6 weighed with greater care. An accomplice may testify falsely to
7 accuse others in order to shift blame from himself or in the
8 expectation that the government will be lenient with him for
9 what he admits he has done. So that's why accomplice testimony
10 should always be weighed with caution and greater care, but
11 accomplice testimony, if you find it credible, is proper evidence
12 and can be used to support a conviction.

13 So, in short, when you consider credibility,
14 apply the same considerations and sound judgment that you would
15 apply in deciding the truth or falsity of important matters that
16 occur in your lives.

17 A final word about testimony: In this case, the
18 defendant did not testify. The law does not compel a defendant
19 to take the stand and testify. He has a constitutional right
20 not to testify. No presumption of guilt may be raised and no
21 unfavorable inference of any sort may be drawn from the fact
22 that the defendant chose to exercise his constitutional right
23 not to testify. You must not permit such fact to weigh in the
24 slightest degree against the defendant, nor should it enter into
25 your discussions or deliberations. As I mentioned before, the

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1 defendant is not required to establish his innocence, he need
2 not produce any evidence whatever if he chooses not to. The
3 burden always rests on the government to prove the defendants
4 guilty.

5 I remind you that as jurors you are duty-bound
6 to apply the law, as I have explained it, to the facts, as you
7 determine them, and in that manner reach your verdict.

8 When you reach the jury room, select one of your
9 number as the foreman or forelady to preside over your delibera-
10 tions, determine the facts on the basis of the evidence, apply
11 the law, and then render your verdicts on each count fairly,
12 uprightly, and without a scintilla of prejudice.

13 When you reach a verdict as to each count, it
14 must be unanimous. It is the duty of each juror to discuss and
15 consider the opinions of the other jurors. Despite that, in the
16 last analysis, it is your individual duty to make up your own
17 mind and to decide the case on the basis of your own individual
18 judgment and conscience.

19 When you reach the jury room, I will ask you to
20 wait just a few moments until the Clerk brings you the indictment
21 and the exhibits. You can go ahead and select your foreman or
22 forelady, but wait a moment before deliberating until the indict-
23 ment and exhibits are there. Once he has brought them to you,
24 begin your deliberation and let us know --

25 MR. MCGOWAN: May I approach the bench as soon as

1 they retire? It's my understanding I have to do this prior to
2 the retirement of the jury.

3 THE COURT: I don't think so.

4 (Jury left courtroom at 10:45 a.m.)

5 THE COURT: I tell them that, Mr. McGowan, just
6 so that you will have a chance to be heard before they begin
7 deliberating. I don't want you to do that in their presence,
8 which the rule forbids, and I don't want a hurried bench
9 conference that they might overhear.

10 MR. MCGOWAN: All right, your Honor.

11 THE COURT: Does the government have any
12 exceptions or further requests to charge?

13 MR. CUTHBERTSON: The government does not.

14 THE COURT: Does the defendant?

15 MR. MCGOWAN: Yes, your Honor. Your Honor did
16 not give various paragraphs of the requested instructions, and
17 I now take exception to that.

18 THE COURT: I assume you're referring to the ones
19 that I told you I would not, you're not referring to any I
20 indicated I would give, are you?

21 MR. MCGOWAN: I am just referring to those in the
22 two documents which I filed with your Honor which are
23 denominated Defendant's Request to Charge. I believe you did
24 not give -- this is for purposes of the record.

25 THE COURT: Well, I understand what that means.

1 On the other hand, it's also for purposes of enabling me to
2 know whether there is anything further I ought to tell the jury.
3 If you mean the ones I told you I would not give, you have
4 made your record on that.

5 MR. MCGOWAN: I want to --

6 THE COURT: If there are others where I said I
7 would cover the points you made, but perhaps not in your words,
8 so if you are referring to those and you think it didn't fairly
9 convey your thought, you better tell me.

10 MR. MCGOWAN: Yes. Well, I believe you did tell
11 me that you would not give paragraphs 12 through 13, and I
12 believe your Honor did not give those today.

13 THE COURT: That's correct.

14 MR. MCGOWAN: And you explained yesterday, I
15 believe, your reasons for that.

16 THE COURT: That's right.

17 MR. MCGOWAN: Apparently you went into great
18 detail explaining why you thought those were not proper: that
19 is, paragraphs 12 through 13, and then, however, I am a little
20 bit confused based on our conference yesterday about the
21 supplemental request to charge. However, I believe your Honor
22 did not give paragraphs 21 through 23, either the substance or
23 anything else pertaining to those.

24 THE COURT: I thought I indicated to you I would
25 not.

1 MR. MCGOWAN: Yes. I just want to make it very
2 clear that I am objecting not only to the failure to give
3 paragraphs 12 through 18, but also paragraphs 21 through 23.
4 This is again for purposes of an appeal record, so that it will
5 be clear what was asked and what wasn't given.

6 THE COURT: I think I covered the substance of
7 21. I did not go into the matters you have alleged in 23.
8 I just don't think those are for the jury at all.

9 MR. MCGOWAN: I do not believe your Honor gave
10 21, but I am sure that there is room for disagreement on that
11 point. In any event, your Honor's failure to give 12 through
12 18 and paragraphs 21 through 23 that I am now putting on the
13 record.

14 THE COURT: All right.

15 MR. MCGOWAN: I believe your Honor also said
16 that specifically, as I took it down, you told the jury to this
17 effect, "an official form is not -- the fact that the form that
18 was used here by the track is not an official form, is not
19 necessarily a defense to this action." Of course, I submit
20 that it is, but quite apart from that, it seems to me that this
21 language is rather confusing to me, and I think it may be
22 confusing to the jury.

23 My point is that the jury should have been
24 instructed that only if a false statement or inaccurate statement
25 or incomplete statement was made on a form that was required by

1 the Internal Revenue laws and regulations would have constituted
2 a crime.

3 THE COURT: We did discuss that, and since
4 convictions have been upheld in this Circuit as to false state-
5 ments on piece of paper that are not 1099's at all, it seems
6 to me that cannot be a correct statement of the law.

7 MR. MCGOWAN: One other point that I do ask the
8 Court, I think the Court misstated part of the record to the
9 jury, and a part that's rather important to me. I believe that
10 you stated to the jury that this ticket had been bought by
11 Kubesh or had been bought from Kubesh for a price approximately
12 10 percent less than its face.

13 Now, as I recall Kubesh's testimony, he had no
14 recollection whatsoever of what the price was that was paid, and
15 I think this reference to 10 percent is damaging to my client
16 because I don't believe it states the record.

17 THE COURT: My notes indicate that the ticket was
18 \$1200 and he got about \$100 less.

19 MR. MCGOWAN: I think the man's testimony was
20 that he did not know what he had received for the ticket.

21 THE COURT: Well, he may not have known the
22 exact figure, but in my notes it indicates that what he did say
23 was he got about \$100 less, which is about 10 percent.

24 MR. MCGOWAN: I just want to make my objections
25 to the Court's charge.

1 THE COURT: All right.
2 MR. MCGOWAN: As a matter of record.
3 THE COURT: Anything else?
4 MR. MCGOWAN: No, sir, thank you.
5 THE COURT: In view of those, I will not charge
6 further.
7 Are the exhibits in order? Have counsel seen
8 them?
9 MR. MCGOWAN: I would like to make sure that
10 they are. I would like to see them before they go in.
11 THE COURT: Do that right now, please.
12 MR. MCGOWAN: Thank you.
13 THE COURT: All set?
14 MR. MCGOWAN: All set.
15 (Recess taken.)
16 THE CLERK: Case of United States of America
17 versus Louis DiMaio, Criminal N-76-95, would the foreman or
18 forelady state your name for the record?
19 THE FOREMAN: William Whelan.
20 THE CLERK: Have you agreed upon a verdict?
21 THE FOREMAN: Yes, we have.
22 THE CLERK: What is your verdict as to Count One
23 of the indictment?
24 THE FOREMAN: Guilty.
25 THE CLERK: What is your verdict as to Count Two

Immediately below is
Connecticut Track's
Home-Made Form 1099
(Exhibit 1)

FORM 1099
U.S. Treasury Department
Internal Revenue Service

U.S. INFORMATION RETURN FOR CALENDAR YEAR 19

19

KIND AND AMOUNT OF INCOME PAID						
1. Salaries, Fees, Commissions, or Other Compensation. Do not include amount reported on Form W-2.	2. Interest on Notes, Mortgages, Bank Deposits, Etc.	3. Rents and Royalties	4. Annuities, Pensions, and Other Fixed or Determinable Income	5. Foreign Items (\$600 or more)	6. Dividends (\$10 or more) (For Exceptions See Instructions)	7. Patrons Dividends, Rebates, or Refunds (\$100 or more)
\$1261.80						

TO WHOM PAID (Print full name and home address)

NAME Ed Smith
ADDRESS Cuther St
Stint Mich

Drivers Lic. No.

S.S. 3622-48-6006
Edward S Smith
Signature of payee

BY WHOM PAID (Name, address, and employer's identification number)

D.D. ☐
PERF ☐
QUIN. ☐
EX. ☐
SUP. ☐
TRI. ☒
1/26/76
2000
3

Cashiers Name Michael

CONNECTICUT YANKEE
GREYHOUND RACING INC.
PLAINFIELD, CONN. 06374

050911575

DATE 4-5-76, 19

Ticket Serial No. 1254180

Immediately below is
Official IRS Form 1099
(Exhibit 501)

For Official Use Only

Statement for Recipients of 1976

Miscellaneous
Income
Copy A
For Internal Revenue
Service Center

Type or print
PAYER'S
name, address,
ZIP code, and
Federal
identifying
number.

Recipient's identifying number	1 Rents	2 Royalties	3 Commissions and fees to non-employees (No Form W-2 items)	4 Prizes and awards to non-employees (No Form W-2 items)
95 ☐				
Type or print RECIPIENT'S name, address, and ZIP code below (Name must align with arrow).				
a. Amount			b. Source	

BEST COPY AVAILABLE

For instructions on completing this form, see "Instructions for Form 1099."

Form 1099-MISC

☆ GPO : 1975-O-575-006 25-1116272

Department of the Treasury—Internal Revenue Service

A-114

1976 Department of the Treasury Internal Revenue Service

Instructions for Form 1096

(Annual Summary and Transmittal of U.S. Information Returns) and Forms 1099-DIV, 1099-INT, 1099L, 1099-MED, 1099-MISC, 1099-OID, 1099-PATR, 1087-DIV, 1087-INT, 1087-MED, 1087-MISC, and 1087-OID

Highlights

Nominee's Return.—A nominee's return (or returns), on the appropriate form of the 1087 series should be filed with Internal Revenue (except for payments received by a husband or wife on behalf of the other) by any recipient, whose taxpayer identifying number appears on a form of the 1099 or 1087 series or equivalent statement for a payment, but who is not the actual owner of the entire payment amount reported.

Magnetic Tape and Disk Pack Reporting.—The Service encourages filing information returns on magnetic tape or disk pack. This gives payers more flexibility compared with submitting returns on paper forms. Different types of payments—interest, dividends, and rents—may be reported on the same tape or disk submission. Payers have also found advantages in economy, efficiency, and greater flexibility for integrating the reporting required under the Internal Revenue Code with their reporting to other Government agencies. See Revenue Procedures 75-20 and 75-27 on magnetic tape and disk pack reporting of information documents available at any Internal Revenue Service Center.

Separate Transmittals.—Payers filing returns on paper forms must use a separate transmittal, Form 1096, for each different type of form. They must also use a separate Form 1096 to send forms of recipients whose identifying numbers are missing. These instructions apply only to payers filing paper forms.

Statements for Recipients.—Payers have considerable flexibility in giving recipients payment information. Copies of the forms filed with Internal Revenue need not be used for this purpose. (See instruction F.)

Forfeiture of Interest on Time Deposits.—For more detailed instructions for determining the amount of forfeiture deductible by the depositor (Forms 1099-INT and 1087-INT, Box 3) see Revenue Rulings 75-20 and 75-21 available at any Internal Revenue office.

General Instructions

A. When to File.—Form 1096 must be used to summarize and transmit Forms 1099-DIV, 1099-INT, 1099L, 1099-MED, 1099-MISC, 1099-OID, 1099-PATR, 1087-DIV, 1087-INT, 1087-MED, 1087-MISC, and 1087-OID on or before February 28, 1977.

B. Where to File.

If your legal residence, principal place of business, office, or agency is located in

Use this address

New Jersey, New York City and counties of Nassau, Rockland, Suffolk, and Westchester	Internal Revenue Service Center 1040 Waverly Avenue Holtville, N.Y. 11799
New York (all other counties), Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont	Internal Revenue Service Center 310 Lowell Street Andover, Mass. 01812
District of Columbia, Delaware, Maryland, Pennsylvania	Internal Revenue Service Center 11601 Roosevelt Boulevard Philadelphia, Pa. 19155
Alabama, Florida, Georgia, Mississippi, South Carolina	Internal Revenue Service Center 4800 Buford Highway Chamblee, Georgia 30006
Michigan, Ohio	Internal Revenue Service Center Cincinnati, Ohio 45298
Arkansas, Kansas, Louisiana, New Mexico, Oklahoma, Texas	Internal Revenue Service Center 3651 S. Interregional Hwy. Austin, Texas 78740
Alaska, Arizona, Colorado, Idaho, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington, Wyoming	Internal Revenue Service Center 1160 West 1200 South St. Ogden, Utah 84201
Illinois, Iowa, Missouri, Wisconsin	Internal Revenue Service Center 2306 E. Bennister Road Kansas City, Mo. 64170
California, Hawaii	Internal Revenue Service Center 5045 East Butler Avenue Fresno, Calif. 93888
Indiana, Kentucky, North Carolina, Tennessee, Virginia, West Virginia	Internal Revenue Service Center 3131 Democrat Road Memphis, Tenn. 38110

If you have no legal residence or principal place of business in any Internal Revenue district, file with the Internal Revenue Service Center, 11601 Roosevelt Boulevard, Philadelphia, Pa. 19155.

If you pay nontaxable dividends to your shareholders (other than actual distributions of subchapter S corporations out of previously taxed income), complete and file Form 5452, Corporate Report of Nontaxable Dividends, on or before February 28, 1977, with the Director, Corporation Tax Division, T.C. 3:3:E&P, Internal Revenue Service, Washington, D.C. 20224.

C. Calendar Year Basis.—File Forms 1099 and 1087 on a calendar year basis.

D. Identifying Numbers.—The Service associates and verifies payments to income recipients with corresponding amounts on tax returns, principally through taxpayer identifying numbers. It is particularly important that correct social security or employer's identification

numbers for recipients be provided on the forms, magnetic tape or disk pack sent to the Service. For each omission of a required identifying number, the law provides that the Service may charge a \$5.00 penalty, unless the payer or payee responsible for furnishing the number supplies an explanation that establishes reasonable cause for not having done so. For those engaged in a trade or business (including employee trusts, retirement systems, etc.) the taxpayer identifying number is the employer identification number (00-0000000). For individuals, it is the social security number (000-00-0000). When listing an identifying number, please separate the nine digits as shown, to distinguish the type of number being reported. See Form 3433, Payer's Request for Identifying Number, for further information.

Sole proprietors who are payers should show their employer identification number on the returns they prepare. However, payers should use the social security numbers of sole proprietors on returns for payments to them.

The full name and address of the recipient must be shown in the section provided on the return. When payments have been made to more than one individual recipient, the name of the recipient whose identifying number is on the return must be shown as the ONLY name on the first line. The names of remaining individual recipients should be shown on the second line. If the recipient is NOT an individual and the name runs over the first line, you may continue the name on the second line, and if necessary, on following lines.

E. Shipping and Mailing.—Payers who file on paper forms and who use more than one type of form should group returns of the same type and send each group separately from the others. For example, a payer of both interest and dividends should file Forms 1099-INT with one Form 1096 and Forms 1099-DIV with a second Form 1096. Separate returns for which you have not yet been able to obtain recipients' taxpayer identifying numbers from those with identifying numbers and file them with their own Form 1096.

If you are sending many forms, you may send them in conveniently-sized packages. On each package write your name and identifying number, number the packages consecutively, and place Form 1096 in package number one. At the top of Form 1096 show the number of packages. Postal regulations require forms and packages to be sent by first class mail.

F. Statements to Recipients.—Statements to income recipients need not be on a copy of the paper form filed with the Service. They may report different types of payments. For example, interest payments and stock dividends may be included on a single statement to the recipient. Payers should identify the items clearly in language similar to that used on the official forms. The message that "This information is being furnished on Forms 1099 (or 1087) to the Internal Revenue Service" should also appear on the statement. You may combine the statements with other reports or financial or commercial notices, or expand them to include other information of interest to a depositor, patron, or shareholder.

Payers are not always required to give statements to recipients, but we prefer they do so. It helps recipients prepare

their income tax returns. Generally you should provide the statements between December 31, 1976, and January 31, 1977. However, you may issue them early in some situations, as provided by the regulations. For example, after final payments, after redemption or maturity of securities, or after final withdrawal of deposit.

G. Returns Filed with the Service.—We encourage payers to use magnetic tape or disk pack reporting for filing information returns with the Service. (See Highlights on page 1.)

Payers using paper forms must report payments on the appropriate form, as explained in the Specific Instructions below. See Revenue Procedures 75-14 and 75-15, IRB 75-10, on specifications for private printing of information documents. If proposed privately printed forms do not meet the specifications contained in the Procedure, payers may request special consideration by submitting their proposed forms to the Internal Revenue Service, Washington, D.C. 20224 (Attention: ACTS:T:C).

On corrected returns center the words "CORRECTED RETURN" (in upper case letters) in the space at the top of the return to the right of the space marked "For official use only" and check the box in the left margin. Complete all required data boxes on a corrected return since it supersedes the information previously reported. Statements for recipients should also be identified as "Corrected."

Although the Service does not require payers to file a statement reconciling changes, payers should reconcile payments shown on corrected information returns with their own records.

The regulations call for a signed affidavit on the transmittal document. This requirement is fulfilled by signing the Form 1096 on the bottom after the declaration of compliance. A separate affidavit is not necessary.

H. Other Information Returns.—The information you give on the following returns need not be repeated on the returns discussed in the Specific Instructions:

- (1) Returns filed with Form W-3:
 - (a) Form W-2 reporting wages and other employee compensation.
 - (b) Form W-2P reporting annuities, pensions and retirement pay.
 - (c) Form 1099R reporting lump-sum distributions under retirement and profit-sharing plans.
- (2) Forms 941, 941E, 942, and 943 reporting income paid;
- (3) Forms 1042, 1042S, 1000, and 1001 reporting income;
- (4) Form 1042 reporting interest on tax-free covenant bonds;
- (5) Form 2439 reporting undistributed long-term capital gains of a regulated investment company;
- (6) Schedule K-1 of Form 1065 reporting distributive shares or salaries to members of a partnership;
- (7) Schedule K-1 of Form 1041 reporting distributions to beneficiaries of trusts or estates;

- (8) Schedule K-1 of Form 1120S reporting constructive distributions to shareholders of subchapter S corporations. Report actual distributions on Form 1099-DIV;
- (9) Schedule K of Form 1120-DISC reporting actual and constructive DISC distributions to shareholders.

Specific Instructions

If the distribution includes non-cash property, show the fair market value of the property at the time of payment.

Although you need not report payments smaller than the minimum described below, you may prefer, for economy and your own convenience, to file Copies A for all payments. The Service encourages this.

Form 1099-DIV

You must provide a Statement for Recipients of Dividends and Distributions for each person (a) to whom you have paid gross dividends and other distributions on stock (box 1) amounting to \$10 or more or (b) for whom you have withheld and paid foreign tax on dividends and other distributions on stock, if the recipient can claim credit for the tax on his or her income tax return. See regulations under section 6042 for definition of dividends. Report in:

Box 2.—Dividends qualifying for the \$100 dividend exclusion on Form 1040.

Box 3.—Dividends not qualifying for exclusion (do not include amounts shown in boxes 4 and 5).

Box 4.—Capital gain dividends.

Box 5.—Nontaxable distributions, if determinable. (File Form 5452 for dividends paid from other than earnings and profits.)

Box 6.—Foreign tax withheld and paid on dividends and other distributions on stock. Be sure to include this amount in the appropriate boxes above in U.S. dollars.

Box 7.—Payers may further help recipients compute their foreign tax credit (on IRS Form 1116) by showing the name of the foreign country or U.S. possession for which the tax was withheld.

Form 1099-DIV applies to actual, but not constructive distributions, which subchapter S corporations made to shareholders. Report in box 5 nontaxable actual distributions such as a corporation paid from income previously taxed. Report on Schedule K-1 (Form 1120S) constructive distributions considered paid and taxable to shareholders from current year earnings and profits.

Form 1099-INT

You must provide a Statement for Recipients of Interest Income for each person (a) to whom the amounts you paid that are reportable in boxes 1 and 2 amount to at least \$10 (except for the \$600 limit described in the instructions below for box 2), or (b) for whom you withheld and paid foreign tax on interest. Report in:

Box 1.—Amounts, whether or not designated as interest, paid, or credited to any person's account by savings and loan associations, mutual savings banks not having capital stock represented by

shares, building and loan associations, cooperative banks, homestead associations, credit unions, or similar organizations.

Box 2.—Amounts of interest paid or credited to any person's account. Generally, this is interest on bank deposits, corporate bonds, and stockholder's accounts. Also report in box 2 payments of interest not meeting these criteria, if they total \$600 or more for any person. This includes foreign items, defined in the regulations under section 6041. These amounts are also to be reported in box 2.

Box 3.—Amounts of interest forfeited due to premature withdrawal of time deposits, and deductible by the recipient from gross income.

Box 4.—Foreign tax withheld and paid on interest (applicable only to taxes eligible for payee's foreign tax credit). Be sure to include this amount in the appropriate boxes above in U.S. dollars.

Box 5.—Payers may further assist recipients in computing their foreign tax credit (on IRS Form 1116) by showing the name of the foreign country or U.S. possession for which the withheld tax applies.

Do not include in either boxes 1 or 2, interest on tax-free covenant bonds, reportable on Forms 1042S.

Form 1099-MISC

Statement for Recipients of Miscellaneous Income is required for each person to whom you have paid at least \$600 in rents, royalties, and other payments reportable on the form. Report in:

Box 1.—Gross rents. Do not include rent paid by a tenant to a real estate agent.

Box 2.—Gross royalty payments (i.e., prior to severance and other taxes which may have been withheld and paid).

Box 3.—Commissions, fees, and other compensation to nonemployees. Do not include items you report on Form W-2.

Box 4.—Prizes and awards to non-employees. Do not include Form W-2 items.

Box 5.—Other fixed and determinable income.

Form 1099-MED

You must provide a Statement for Recipients of Medical and Health Care Payments for each physician or other supplier or provider of services under health, accident, and sickness insurance programs to whom you paid at least \$600. (See Rev. Rul. 69-595, 1969-2, C.B. 242, and Rev. Rul. 70-608, 1970-2, C.B. 286.)

Form 1099-OLD

You must provide a Statement for Recipients of Original Issue Discount if you are any of the following: a corporation with any bond outstanding or other evidence of indebtedness in registered form issued after May 27, 1969; an issuer of certificates of deposits, made, purchased, or renewed after December 31, 1970, if there is original issue discount of at least \$10 and the term of the obligation or deposit exceeds a year; or a financial institution holding time and savings deposits.

"Original issue discount" means the difference between the stated redemption price at maturity and the issue price. Discount of less than one-fourth of 1

EXHIBIT 502 (CONTINUED)

percent of the stated redemption price at maturity, multiplied by the number of full years from the date of issue to maturity, is considered to be zero.

Ordinarily, you need file only one Form 1099-OID for the depositor or holder of a particular obligation for the calendar year. If a person holds more than one discount obligation, issue separate Forms 1099-OID for each obligation. However, corporations which do not use actual dates in computing the discount may prepare a Form 1099-OID for each person who holds a discount obligation on the semi-annual record date used for paying stated interest. If interest is not paid semi-annually and your corporation does not use actual dates, you should prepare a Form 1099-OID for each person who is a holder of record of a discount obligation on June 30 and December 31 of the year. Or, if a person holds more than one certificate of the same issue for the same period of time during the calendar year, and if Form 1099-OID amounts are proportional, you may treat all such certificates as one discount obligation and file a single Form 1099-OID. This alternative does not apply to deposits; you must use the actual date of deposit and compute original issue discount on a straight-line, monthly, prorata basis. Report in:

Box 1.—The total amount the holder or depositor is to include as original issue discount.

Box 2.—The ratable monthly portion of original issue discount. To find this, divide the discount by the number of complete months or fractions of months from the date of original issue to the stated maturity date. A "complete month" begins on the date of original issue and on the corresponding date of each succeeding calendar month. If an obligation is acquired on any date other than that on which a "complete month" begins, prorate the ratable monthly portion of original issue discount for that complete month between the transferor and the transferee. The transferee, not the transferor, is considered to hold the obligation on the date of acquisition. In making this computation, you may treat each month as having 30 days. The fraction of the month in which the obligation matures is assumed to be the remainder of a month of the same length as the one in which the obligation was originally made.

Box 3.—The issue price of the obligation.

Box 4.—The stated redemption price at maturity.

For "time deposit open account arrangements" payers are not required to enter amounts in boxes (2), (3), or (4) of Form 1099-OID. Under a "time deposit open account arrangement" deposits may be made from time to time, and ordinarily no interest will be paid or con-

structively received until the fixed maturity date. All deposits under such an arrangement constitute parts of a single obligation. However, the amount of original issue discount to be ratably included as interest in the depositor's gross income for any taxable year is the sum of the amounts separately computed for each deposit.

See the regulations under Code sections 1232 and 6049 for additional information and examples of original issue discount. Original issue discount not subject to the rules above, such as discount on the sale of an obligation with a term of one year or less from date of original issue, is reportable on Form 1099-INT.

Form 1099-PATR

You must provide a Statement for Patrons of Cooperatives for each person to whom the cooperative has paid at least \$10 in patronage dividends and other distributions, described in section 6044(b) of the Internal Revenue Code. On receiving non-qualified allocations and non-qualified per-unit retain certificates, the recipient should not include them in income. Instead, the recipient is to include any amount received from the sale, redemption, or other disposition of the certificates. The amount received is considered to be a gain from the sale or exchange of property that, to the extent of its stated dollar value, is not a capital asset. However, the stated dollar value of qualified written notices of allocation and qualified per-unit retain certificates, as well as patronage dividends of money, are to be included in income on receipt. In general, the recipient should not include in income patronage dividends attributable to the purchase of depreciable or capital assets, or to personal or living items. For more information see Publication 225. Report in:

Box 1.—The total of patronage dividends paid in cash (qualified or "consent" checks), qualified written notices of allocation (face amount), and other property.

Box 2.—The total of non-patronage distributions paid in cash (qualified or "consent" checks), qualified written notices of allocation (face amount), and other property (applicable only to farmer cooperatives qualifying under Internal Revenue Code section 521).

Box 3.—The total of per-unit retain allocations paid in cash, qualified per-unit retain certificates (face amount), and other property.

Box 4.—All redemptions of non-qualified written notices of allocation issued as patronage dividends, non-qualified written notices of allocation issued as patronage allocations (applicable only to farmer cooperatives qualifying under Internal Revenue Code section 521), and non-qualified per-unit

retain certificates, issued with respect to marketing.

A cooperative determined to be primarily engaged in the retail sale of goods or services that are generally for personal, living or family use may obtain, on request, exemption from the Service's reporting requirements. Use Form 3491 to apply for this exemption.

Report dividends paid on cooperatives' capital stock on Form 1099-DIV.

Form 1099L

Distribution in liquidation. This statement is required for distributions in redemption or liquidation under sections 302, 331, 333, and 346, amounting to \$600 or more to any shareholder.

Nominees' Returns and Statements

The nominal or record recipient (nominee) should file a return on forms of the 1087 series (1087-DIV, 1087-INT, 1087-MISC, 1087-MED, and 1087-OID) or on computer produced magnetic tape or disk pack with the Service. Payments reported on Forms 1099 (or magnetic tape or disk pack equivalent) are related by the Service to recipients as shown on these returns. Therefore, to avoid time-consuming and unproductive Service contacts with persons who are not the actual income recipients, a nominee should file Forms 1087 even though the law does not require such filing. If a form of the 1099 series (or magnetic tape or disk pack equivalent) shows two or more recipients, the recipient whose Federal identifying number is on the form or statement should file the appropriate Form(s) 1087 with the Service showing the amount attributable to each of the other recipients. Statements should also be given to each of the other recipients. However, a husband or wife need not file a form of the 1087 series with the Service nor provide a statement to show payments to the other.

On Forms 1087-DIV or computer produced magnetic tape or disk pack filed with the Service, nominees must report the gross amount of dividend payments.

The Service encourages nominees to provide any information described in the other boxes. The Service also encourages nominees to include on actual owner's statements any information from the periodic statements about dividends not qualifying for the \$100 exclusion, capital gain dividends, non-taxable distributions, and foreign taxes. However, this is not required.

Recipients' statements that do not show annual totals should state that the nature of the distributions included in the "gross" appears on the periodic statements. Form 1087-DIV provides space to report these amounts for use by nominees sending the form to recipients as their statement.

A-117

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

By: *[Signature]*
Deputy Clerk

UNITED STATES OF AMERICA :

v. :

CRIMINAL NO. N-76-95

LOUIS DiMAIO and JOHN DOE, a/k/a :
EDWARD S. SMITH :

DEFENDANT'S REQUEST TO CHARGE

1. The defendant, Louis DiMaio, is charged in two separate counts.

2. Count I alleges that he did "wilfully and knowingly aid and assist in" the preparation and presentation of a false and fraudulent U. S. Information Return (FORM 1099) for the calendar year 1976, in which it was represented that a John Doe, a/k/a Edward S. Smith, was the recipient of compensation on April 5, 1976, of \$1,261.80 from payment of a winning pari-mutuel trifecta ticket (No. 1254480) issued by Connecticut Yankee Greyhound Racing, Inc. whereas defendant well knew and believed at the time that one Dennis L. Kubesh was the recipient of compensation on this ticket (No. 1254480). This Count I is brought under the language of Sec. 7206(2), IRC of 1954.

3. Count II alleges that on April 5, 1976, the defendant DiMaio conspired with John Doe a/k/a Edward S. Smith, and with the said Dennis L. Kubesh to prepare the allegedly false and fraudulent U. S. Information Return Form 1099 referred to

DOCUMENT NO. 18

10. Section 7206(2) of the Internal Revenue Code
reads as follows:

"Any person who--

(2) Aid or Assistance.--Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;

shall be guilty of a felony"

11. Section 6041(a) of the Internal Revenue Code
reads as follows:

("All persons engaged in a trade or business and making payment in the course of such trade or business to another person, of) rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits and income) (other than payments to which section 6042(a)(1), 6044(a)(1), or 6049(a)(1) applies, and other than payments with respect to which a statement is required under the authority of section 6042(a)(2), 6044(a)(2), 6045, 6049(a)(2), or 6049(a)(3), (of \$600 or more in any taxable year), or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, (shall render a true and accurate return to the Secretary of his delegate, under such regulations and in such form and manner and to such extent as may be prescribed by the Secretary or his delegate, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment)."

12. You will note that under Section 6041 people required to make information returns, such as Form 1099, are required to make them "under such regulations and in such form and manner and to such extent as may be prescribed by the Secretary or his delegate...."

13. The term "Secretary" means the "Secretary of the Treasury"; and the term "delegate" means an "officer, employee, or agency of the Treasury Department duly authorized by the Secretary (directly, or indirectly by one or more redelegations of authority) to perform the function mentioned or described in the context...." Section 7701 (11) and Section 7701 (12), Internal Revenue Code of 1954.

14. The Internal Revenue Service published Rev. Proc. 75-14, on March 10, 1975, in which it set out the official "Form 1099" to be used by payors of \$600 or more. (Rev. Proc. No. 1975-10, March 10, 1975.)

15. All of the official forms so authorized for use by payors inform the public that: "For instructions on completing this form, see 'Instructions for Form 1096'". (See Exhibit A of Rev. Proc. 75-14)

16. Rev. Proc. 75-14 permits a payor to avoid use of the official "Form 1099" if such payor uses a private form that is an "exact replica" of the official Form 1099 set out in Rev. Proc. 75-14. (See Sec. 4 of Rev. Proc. 75-14).

17. Rev. Proc. 75-14 also permits a payer to avoid both (a) use of the official "Form 1099", and (b) also use of an "exact replica" of "Form 1099", in only one other situation, viz. where "proposed substitutes not conforming totally to these specifications...[are] submitted by payers to the Commissioner of Internal Revenue Service, Attention: ACTS: T: C, 1111 Constitution Avenue, N.W., Washington, D.C. 20224, for consideration", which submissions must contain "an explanation of the need for the specific deviations and the number of information returns affected". (Sec. 3 of Rev. Proc. 75-14).

18. If the prosecutor has not established to your satisfaction beyond a reasonable doubt that the "Form 1099" used in this case was a properly authorized official "Form 1099", or properly authorized substitute conforming to Rev. Proc. 75-14, then you must acquit this defendant, for in the context of this case the crime alleged by Count I of this indictment is a crime under Section 7206(2) and Section 6041, punishing untrue and inaccurate statements made on/officially prescribed or authorized "Form 1099". (United States v. John B. Levy, 533 F.2d 969 (USCA 5, 6/21/76)), also unofficially reported at 76-2 U.S.T.C. Par. 9500 (CCH) (photocopy attached), and 38 AFTR 2d 76-5274.

Respectfully submitted,

Counsel for the Defendant

FILED

JAN 20 10 16 AM '77

U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

LOUIS DIMAIO and JOHN DOE, a/k/a
EDWARD S. SMITH

:
:
: CRIMINAL NO. N-76-95
:
:

DEFENDANT'S SUPPLEMENTAL REQUEST
TO CHARGE

19. Each count of this indictment alleges that the defendant LOUIS DIMAIO acted "willfully". The prosecution must prove his "willfulness", and beyond a reasonable doubt, as one of the elements making up its burden of proof on each count.

20. In the context of this case, "willful" means "the intentional violation of a known legal duty". United States v. Pomponio, 97 S.Ct. 22 (1976).

21. To convict the defendant under either Count I, or Count II, the prosecution must prove to your satisfaction beyond a reasonable doubt that the defendant, LOUIS DIMAIO, on April 5, 1976, had and knew he had a "legal duty" to see to it that the name of Dennis L. Kubesh should be shown as the "recipient" on a U.S. Information Return (Form 1099) that was to be filled out contemporaneously with the cashing of winning pari-mutuel trifecta ticket serial number 1254480.

22. Further, in this case, to convict the defendant

EXHIBIT NO. 14

SALTER, MCGOWAN, ARCARO & SWARTZ, INCORPORATED - ATTORNEYS AT LAW - PROVIDENCE, RHODE ISLAND 02903

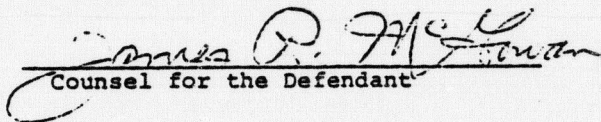
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under Count II, the prosecution must prove to your satisfaction beyond a reasonable doubt that, although knowing he was violating a "legal duty" imposed on him, defendant DIMAIO, on April 5, 1976, nevertheless agreed with one John Doe, a/k/a Edward S. Smith, and Dennis L. Kubesh, that Dennis L. Kubesh's name would not be shown as the "recipient" on a U.S. Information Return (Form 1099) to be filled out contemporaneously with the cashing of winning pari-mutuel trifecta ticket serial number 1254480.

23. I instruct you as a matter of law that the name of the original "winner", or "winners", of this trifecta ticket was not required, on the cashing of this ticket, to be shown on a U.S. Information Return (Form 1099), unless such "winner" or "winners" personally cashed such ticket; but that if this ticket was actually cashed by someone other than the actual "winner" or "winners", then such other person as the "nominal" or "record recipient" simply had a duty to file, on or before February 28, 1977, other required additional forms, namely Forms 1087, identifying for the Internal Revenue Service the "winners" or "actual income recipients" of the said trifecta ticket. (See INSTRUCTIONS FOR FORM 1096, particularly HIGHLIGHTS and GENERAL INSTRUCTIONS at page 1, and NOMINEES' RETURNS AND STATEMENTS, at page 3).

24. I instruct you as a matter of law that by itself
it is not a crime of any degree to buy or sell a winning
racetrack ticket before being cashed.

Respectfully submitted,


Counsel for the Defendant

United States District Court
FOR THE

FEB 25 11 09 AM '77

DISTRICT OF CONNECTICUT

U.S. DISTRICT COURT
NEW HAVEN, CONN.

MICROFILM

FEB 23 1977 United States of America

v.
LOUIS DIMAIO

No. N-76-95 Criminal

On this 22nd day of February, 1977 came the attorney for the government and the defendant appeared in person and by counsel

It Is ADJUDGED that the defendant upon his plea of "not guilty" and the jury having returned a verdict of guilty has been convicted of the offense of violation of Title 26, Section 7206(2), and violation of Title 18, Sections 2(a), 2(b) and 371, of the United States Code (did wilfully and knowingly aid and assist in the preparation and presentation to the Internal Revenue Service, of a U. S. Information Return, which was false and fraudulent as to a material fact and conspiracy)

as charged in Counts One and Two and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is ADJUDGED that the defendant is guilty as charged and convicted.

It Is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on Counts One and Two; execution of sentence of imprisonment is suspended after six (6) months and the defendant is placed on probation for a period of three (3) years. The sentences are to run concurrently on both Counts.

~~XXXXXXXXXXXX~~

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It Is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

I hereby certify that the foregoing
is a true and correct copy of the
court record of the case.

MAILED 1977

United States District Judge.

The Court recommends commitment to a correctional facility in Rhode Island.

Clerk.

Insert by name of counsel, counsel, or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel. Insert (1) "guilty" and the court being satisfied there is a factual basis for the plea. (2) "not guilty, and a verdict of guilty." (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. Insert "in count(s) number" if required. Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. Enter any order with respect to suspension and probation. For use of Court to recommend a particular institution

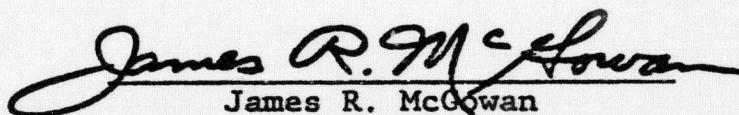
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A-125

Certificate of Service

I hereby certify that service of the within
brief and associated record appendix was made on the
United States on May 20, 1977, by mailing a copy thereof
to its counsel, postage prepaid, properly addressed to:

Michael Hartmere, Esq.
Asst. U.S. Attorney
270 Orange Street, Room 310
P.O. Box 1824
New Haven, Connecticut 06510


James R. McGowan